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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARTIN FINE, WILLIAM BECKER and PHILIP BECKER, Individually, and WILLIAM BECKER and PHILIP BECKER d/b/a BECKER & BECKER, all doing business as 649 BROADWAY EQUITIES CO.,

Petitioners,

vs.

BELLEFONTE UNDERWRITERS INSURANCE CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

This petition arises out of the situation of a property owner who won a judgment for $1.5 million in the District Court, which was then taken away because the 3-judge panel of the Court of Appeals *made a mistake*. Although a second panel of that same court acknowledged that mistake, the judges refused to correct it, stating to do so would "throw a wrench into the collegial workings of our Court...."

This case therefore personifies the need for the Supreme Court to direct the U.S. Courts of Appeals to employ *better* procedures to prevent error and to improve the quality of appellate justice. Although a diversity action, the case raises important questions both of federal and constitutional law:

1. Should this Court, in the exercise of its supervisory powers over the Federal Courts, initiate improved error-prevention and error-correction procedures in the lower courts, and end reliance by litigants on petitions for certiorari as the only available avenue for relief from appellate court mistakes?

2. Should such procedures include uniform exceptions to the "law of the case" doctrine to permit Courts to disregard incorrect earlier rulings in order to prevent manifest injustice?

3. Should the court set uniform rules under *Erie R.R. v. Tompkins* for applying state law enuncited by state courts during the pendency of Federal court cases?

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Petitioners,

vs.

BELLEFONTE UNDERWRITERS INSURANCE CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners MARTIN FINE, WILLIAM BECKER and PHILIP BECKER, individually, and WILLIAM BECKER and PHILIP BECKER d/b/a BECKER & BECKER, all doing business as 649 BROADWAY EQUITIES CO.,* respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit dated March 20, 1985, affirming the District Court's

* These are all individuals and partnerships with no corporate parents or subsidiaries. William Becker is deceased.

denial of petitioners' motion for a new trial after an earlier panel of the Court of Appeals reversed a judgment rendered in favor of petitioners in the District Court in the amount of $1,534,687.60 plus interest.

OPINIONS BELOW

The opinion of the Court of Appeals, dated March 20, 1985, is reported at 758 F.2d 50, and appears in Appendix D hereto, along with the opinion of the District Court for the Southern District of New York dated June 15, 1984, denying petitioners' motion for a new trial on the issue of willfulness (Appendix C) as well as the two earlier opinions by the District and Circuit Courts. (Appendices A and B).

JURISDICTION

The decision of the Court of Appeals for the Second Circuit was rendered on March 20, 1985. The petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

ARTICLE III.—THE JUDICIARY

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and

maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between citizens of different States, – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

United States Constitution

AMENDMENT X—RESERVED POWERS TO STATES

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Title 28, United States Code

§1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

§ 2071. Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

§ 2072. Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

STATEMENT OF THE CASE

This case began in the New York Supreme Court as an action to recover on an "all risks" insurance policy. It was removed to the District Court by the defendant insurance company on grounds of diversity. A lengthy bench trial before Hon. Robert W. Sweet resulted in judgment in favor of petitioners in the amount of $1,534,687.40.

Thereafter the case was appealed to the Court of Appeals for the Second Circuit where it was reversed on the ground that the policy was void under the "concealment, fraud" provisions of the

New York State Insurance Law because the insured had made inaccurate false statements to the insurer during the post-fire investigation. The decision by the original panel is reported at 725 F.2d 179, and is reprinted as Appendix B following the District Court's original opinion in favor of petitioners, dated December 29, 1982 (Appendix A).

On February 22, 1984, the first panel denied petitioners' petition for a rehearing asserting that *willfulness* was an essential element of New York substantive law and there had been no finding that the false statements had been made willfully (*i.e.*, that the insured had made the statements with intent to deceive or defraud) by the District Court. On April 24, 1984, petitioners' petition for suggestion of rehearing *en banc* was also denied.

On May 17, 1984, petitioners moved in the District Court for an order pursuant to Rule 59 and Rule 60(b)(1) and (6), Fed.R.Civ.P., to set aside the judgment and for a new trial, asserting that the Court should hold a new trial on the issue of the insured's willfulness in making the incorrect or false statements. By Opinion dated June 15, 1984, the District Court denied petitioners' motion for a new trial on the ground that the panel's decision was the law of the case. The Court stated that:

> As this court understands the Court of Appeals' decision, any false swearing in an examination by an insured in a 'relevant or productive area' voids the policy. No further facts need be adduced to meet this standard. (C-3).

In short, the District Court concluded that the Court of Appeals had held that a finding of willfulness was not required to void a fire insurance policy. The District Court simultaneously clarified its earlier opinion and stated that it had *never* made a finding of willfulness:

> There was no such finding, only a finding that the testimony given was false. (C-3).

Two weeks after the District Court's decision, on July 1, 1984, the New York Court of Appeals issued its Opinion in *Deitsch Textiles, Inc. v. New York Property Ins. Underwriting Ass'n*, 62 N.Y.2d 999, 479 N.Y.S.2d 487, 468 N.E.2d 669 (1984), in which the Court

held that in addition to materiality, an insurance company must prove willfulness to void a fire insurance policy.

A Petition for Certiorari to the Supreme Court was filed by petitioners on July 18, 1984 (No. 85-105), and was denied. 105 S.Ct. 233 (1984).

This branch of the case began when the order of the District Court denying petitioners' motion for a new trial was appealed to the Court of Appeals for the Second Circuit, where it was affirmed on the ground that the opinion of the first panel of the Court of Appeals (725 F.2d 179) was the *law of the case*, and the District Court therefore had no jurisdiction to consider the petitioners' motion.

The second panel of the Court of Appeals considered petitioners' contention that the intervening decision of the New York Court of Appeals — *Deitsch Textiles, Inc. v. New York Property Ins. Underwriting Ass'n*, 62 N.Y.2d 999, 479 N.Y.S.2d 487, 468 N.E.2d 669 (1984) — was applicable to this case, and stated that the *Deitsch* decision was the controlling New York substantive law that the Court of Appeals *should* apply to this case. The Court, however, held that "we may not now question the first panel's reasoning." (D-9). (As previously noted, this decision by the second panel is set forth in full in Appendix D, following the District Court's opinion denying the motion for a new trial (Appendix C).)

For the convenience of the Court we have set forth a detailed statement of facts underlying the substantive issues underlying this case in Appendix E. This petition relates solely to procedural questions affecting the handling of the mistake committed by the first panel of the Court of Appeals for the Second Circuit.

The First Panel's Mistake

Although the second panel exercised understandable judicial restraint in not openly stating that the first panel made a mistake, the opinion leaves no room for doubt that that was its conclusion.

The key issue below was whether the inaccurate testimony given during the insurance company's post-fire investigation was *willful*. In describing the decision by the first panel, the second panel noted:

> The opinion did not purport to determine whether the false statements in the instant case were willfully made. Nor did it intimate that willfulness was not required. (D-4)

The second panel then reviewed the controlling New York cases and concluded:

> We accept the fact, therefore, that according to the law of New York, a false statement made on an examination under oath must be both material and willful in order to void a fire insurance policy. (D-5)

Q.E.D.: The first panel made a mistake.

To soften the blow, the second panel indulged in the following speculation:

> Perhaps the first panel believed — as the Supreme Court did on this subject in an early case — that if a person makes a statement knowing it to be false the law will infer an intent to deceive. *** It may be that the original panel concluded that the record could not support a finding that appellants' answers to the questions regarding the setting of the thermostat were merely mistaken or inadvertent. Whether we would make the same determination is irrelevant, we may not now question the first panel's reasoning. (D-9)

If such speculation was true, it also would have been error, since New York substantive law requires a specific finding based on "clear and convincing evidence" to sustain a finding of willful and intentional false swearing to void an insurance policy. *Hutt v. Lumbermens Mutual Cas. Co.*, 95 A.D.2d 255, 466 N.Y.S.2d 28, 29-30 (2d Dep't 1983). *Accord Barr Rubber Products Co. v. Sun Rubber Co.*, 425 F.2d 1114 (2d Cir.), *cert denied*, 400 U.S. 808 (1970). There simply was no finding that the insured had made any false statement with intent to deceive the insurer.

While the second panel's handling of the first panel's mistake demonstrated the judges' esteem for their colleagues, it was unjust to the litigant before the Court. A mistake had been made

which cost that litigant a $1.5 million judgment. Why should not the Court correct it?

Importance of Questions Presented

This is a lodestar case for the Supreme Court to resolve an increasing dilemma facing the federal courts – the necessity for developing workable procedures within the present court framework to correct significant errors by the Courts of Appeals.* The solutions proposed here are: (1) direction from this Court to the Courts of Appeals to institute more effective error-detection and prevention techniques; and (2) mandating exceptions to the "law of the case" doctrine to permit District Courts in proper circumstances to disregard erroneous decisions and rulings by the Courts of Appeals in order to achieve substantial justice.

This is an unusual case – the opinions of the District Court and the opinions of the Court of Appeals show on their face a miscarriage of justice for which existing procedures provide no remedy. The first panel of the Court of Appeals reversed the District Court's judgment based on a finding of fact which the appellate court *assumed* the District Court had made. On the subsequent motion for new trial pursuant to Rule 60, Fed. R. Civ. P., the District Court specifically stated that it had *not* made such a finding of fact, but held that it still was precluded by the "law of the case" doctrine from considering petitioners' motion. The second panel then affirmed the District Court's order on the grounds that both the District Court and the Court of Appeals were bound by the law of the case doctrine, and perpetuated the error of the first panel.

This is a *perfect* case for this Court to re-examine the existing law and procedures available to correct errors by the Courts of Appeals and to mandate effective remedies.

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* For some time, the Chief Justice has advocated the creation of an Intercircuit Tribunal which many believe would help to reduce the problem of Court of Appeals error. The prospects of adoption have not been encouraging, however, and the Chief Justice has therefore recently proposed a modified plan. See 72 *A.B.A. Journal* 86(1985). The suggestion in the present petition will remain valid whether or not any intercircuit panel comes into being.

REASONS FOR GRANTING THE WRIT

Summary of Argument

This case dramatically highlights the desirability of developing procedures whereby the Courts of Appeals can adequately reexamine and correct their own errors, and the necessity of prophylactic intervention by this Court to achieve that result. Moreover, though a diversity case,* this case presents important matters of federal law regarding which the Courts of Appeals are in conflict — first, the proper application of the "law of the case" doctrine in federal court, and, second, the proper application of the rule of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), to situations like the one below. Both of these matters are important questions of federal law, and the *Erie* matter, implicating as it does interests of state-federal relations, involves constitutional concerns.

Consider first the general issue of error-correction — an issue of significance for the federal judicial system. It is no longer possible for the Court to sit as a "court of error" over the federal judicial system. It is therefore imperative that the Courts of Appeals adopt measures designed, in the first instance, to avoid error and, in the second instance, to encourage error correction at the Court of Appeals level. The second-look procedures set up under the present rules — the petition for rehearing directed to the same panel and the petition for rehearing *en banc* — do not accomplish the objective of catching and correcting appellate court errors. This case provides a vehicle the Court may use to promulgate more meaningful error-correction procedures.

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* Earlier in the litigation, this case was before the Court, and *certiorari* was denied. 105 S. Ct. 233 (1984). At that point in the litigation, however, this was a garden variety diversity case presenting only a question of interpretation of state law by a federal Court of Appeals — the kind of case that rarely commands the Court's attention. *None* of the important questions of federal law that are presented by this petition had developed. Were the Court to grant *certiorari* now, it would be reviewing *only* questions of federal law.

Quite apart from the general issue of error-correction, this case raises specific and important matters of federal law regarding which the Courts of Appeals are in conflict. The Second Circuit's formulation of law of the case doctrine is incorrect and conflicts in two significant respects with the formulations of that doctrine announced (in appropriate contexts) by other circuit courts. First, the Second Circuit, contrary to the rule adopted by other circuits, extended the law of the case doctrine to preclude litigation of a fundamental issue (willfulness) *not decided* in an earlier stage of the lawsuit. Second, even assuming *arguendo* that the issue of willfulness had been decided earlier in the lawsuit, the Second Circuit, contrary to the rule adopted by the majority of circuits, employed a wooden and inflexible formulation of law of the case doctrine not admitting of exceptions where intervening, controlling authority has made clear that the initial decision was error or where the initial decision would work a manifest injustice. At least after the Second Circuit's decision, each of these issues divides the circuit courts, and, given the importance of rules on former adjudication in the federal system, each of these issues is worthy of the Court's attention.

Finally, in two independent but equally significant ways, the decision of the Second Circuit in this case contravenes the rule of *Erie R.R. v. Tompkins*, *supra*, and conflicts with the decisions of other Circuit Courts. First, by employing the doctrine of "law of the case" to avoid applying the authoritative interpretation of New York law articulated by the New York Court of Appeals in *Deitsch Textiles, Inc.*, *supra*, the Second Circuit (in conflict with at least two other circuits) ignored its obligation to conform its interpretation of state law to the latest authoritative articulation of state law available. Second, by applying a "federal" doctrine to "law of the case," the Second Circuit (though adhering to the rule of a minority of circuits) ignored what the majority of other circuit courts have held to be an obligation to apply *state* rules on former adjudication. Each of these *Erie* questions has divided the circuit courts, and both are worthy of this Court's attention.

I

THIS CASE TYPIFIES THE NEED TO DEVELOP IMPROVED PROCEDURES WHEREBY THE COURTS OF APPEALS CAN ROUTINELY PREVENT OR CORRECT THEIR OWN ERRORS

Today, the Supreme Court sits at the top of an enormous judicial system that generates more cases in a day than the Court could review in a decade. Whether or not the Supreme Court ever was truly a court available to correct all errors and do justice in individual cases, it ceased playing that role with the passage of the Judiciary Act of 1925. In advocating the so-called "Judges Bill" (which relieved the Court of most of its obligatory jurisdiction), Chief Justice Taft stressed that the Supreme Court was a forum for settling disputes of national significance, *not* a court of last resort providing error-correction for disappointed litigants:

> The function of the Supreme Court is conceived to be, not the remedying of the particular litigant wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest. . . .

Taft, *The Jurisdiction of the Supreme Court under the Act of February 13, 1925*, 35 Yale L.J. 1, 2 (1925). Chief Justice Vinson echoed these views when he said, some years later:

> The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions.

Address before the American Bar Association, September 7, 1949, quoted in R. Stern and E. Gressman, *Supreme Court Practice*, at 258 (5th Ed. 1978). Indeed, the Court's insistence that denials of certiorari do not constitute judgments on the merits is based in part on the fact that the Court's role is not error-correction. Thus, today virtually all commentators agree that the modern Court does not, should not, and can not serve as the tribunal of last resort, ensuring that justice is done in the given case. See,

e.g., Griswold, *The Supreme Court's Case Load: Civil Rights and Other Problems*, 1973 U. Ill. L.F. 615, 616-617.

Since it is not possible for the Supreme Court to act as a court of last resort in every federal case, it is imperative that the Courts of Appeals adopt measures designed, in the first instance, to avoid error and, in the second instance, to encourage error correction at the Court of Appeals level in those cases where error does occur.

The Second Circuit threw down its gauntlet to this Court in the opening paragraph of the opinion below:

> It is not inconceivable that on occasion a judgment of this Court may be in error. No proof is required to demonstrate the fallibility of this or any Court. Nonetheless, the rules of appellate procedure are specifically designed to catch those instances when a panel misapprehends or overlooks some point of law or fact. The rules are meant to assure a party on appeal that its argument has been comprehended and considered by the Court. If we ignore these established procedures in an attempt to remedy a perceived error, we will throw a wrench into the collegial workings of our court that are essential to its institutional integrity. (D-2)

The fundamental error in the Second Circuit's statement is the assumption that the Rules of Appellate Procedure have actually provided adequate means "to catch those instances when a panel misapprehends or overlooks some point of law or fact."

The fact is that the second-look procedures set up under the present rules simply do not accomplish the objective of catching and correcting appellate court errors. The Federal Rules of Appellate Procedure make provision for two motions which are ostensibly designed to serve this function – the petition for rehearing, and the petition for rehearing *en banc*. Whether these motions were at one time a viable vehicle for error-correcting is questionable. *See* Louisell & Degnan, *Rehearing in American Appellate Courts*, 25 F.R.D. 143 (1960). The caseload of the Courts

of Appeals has increased dramatically since 1960 and at a substantially greater percentage than District Court filings or petitions for certiorari. Hurst, *The Functions of Courts in the United States, 1950-1980*, 15 Law & Society Rev. 401, 417 (1981). The increased caseload and increased policy making role of the Courts of Appeals has resulted in an obvious diminished exercise of its superintending responsibilities. Today petitions for rehearing are so rarely granted that they serve no real error-correction function. For example, statistics collected by the Administrative Office of the United States Courts reveal that in the twelve-month period ended June 30, 1983 (the most recent year available), 13, 217 appeals were decided by the United States Courts of Appeals; only 66 cases (less than 1 in 200) were reheard *en banc*. In the Second Circuit (the court below), 1,193 appeals were decided; yet, only *one case* was reheard *en banc*. *Annual Report on the Courts, Adminstrative Office of the United States Courts*, Table 9. Notwithstanding this extraordinary statistic, Judge Irving Kaufman, former Chief Judge of the Second Circuit, has argued that the *en banc* procedure is used too frequently. See Kaufman, *The En Banc Proceeding, I.J.A. Report No. 1* at pp. 2-4 (Fall 1984). Statistics are unavailable on the number of panel petitions for rehearing that are granted,* but given the fact that they are directed to the panel which has just decided the case, it would be surprising if they were granted very much more frequently than the petition for rehearing *en banc* (which is directed to the full Court of Appeals). *Cf.* R. Leflar, *Internal Operating Procedures of Appellate Courts* 60 (1976) ("In many appellate courts, a motion for rehearing has come to be regarded as little more than a formality designed to produce delay in enforcement of the judgment."). The simple truth is that, at present, if a circuit panel makes an error, there is no realistic chance that the error will be corrected by a motion for rehearing or rehearing *en banc*.

Dean Roscoe Pound instructs us:

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* We have been advised informally by the Clerk's Office for the Second Circuit that two panel petitions were granted in fiscal year 1984 and one *en banc* petition.

> The idea that procedures must of necessity be wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he is merely to decide the contest, as counsel present it, according to the rules of the game, not to search independently for truth and justice. *** The inquiry is not, What do substantive law and justice require? Instead, the inquiry is, Have the rules of the game been carried out strictly?

Pound, *The Causes of Popular Dissatisfaction With the Adminstration of Justice*, 29 A.B.A. Reports 395, 405-6 (1906). The opinion below strove for what is a monument to strict compliance with the rules. It shows no concern for the requirements of the substantive law of New York, or of justice.

It is conceivable that Rule 60(b) might be a vehicle for error-correction, at least where a circuit panel commits serious error. If, on a Rule 60(b) motion, a district court could depart from a prior holding of a circuit panel where "controlling authority has since made a contrary decision of law applicable to such issues," *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967), or where "the decision was clearly erroneous and would work a manifest injustice," *id.*, the motion might provide relief from error — at least in the most troublesome cases. On the other hand, if, on a Rule 60(b) motion, a district court must follow the rule announced by the court above and rigidly treat even the most outrageous holding of a circuit panel as binding law of the case, the Rule 60(b) motion will not serve any meaningful error-correction function. Thus, whether Rule 60(b) can serve any meaningful error-correction function (at least in the Second Circuit and those circuits that chose to follow the rule announced in the decision below) turns on the Court's willingness to examine and modify the holding *sub judice*. *See* Part II, *infra*.

We will not presume to suggest to the court the direction its initiatives should take for more sweeping change in Court of Appeals procedures. We have set forth some possibilities in Appendix F.

II

THE DECISION BELOW IS INCORRECT AND CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS REGARDING THE PROPER APPLICATION OF THE "LAW OF THE CASE DOCTRINE" IN FEDERAL COURT

(1) The Decision Below, Contrary to the Rule Adopted by Other Circuit Courts, Extended Law of the Case Doctrine to Preclude Litigation of an Issue Not Decided in an Earlier Stage of the Lawsuit

In general, once an issue has been litigated and decided, it is "law of the case". *United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186, 198 (1950). Justice Oliver Wendell Holmes stated in *Missenger v. Anderson*, 225 U.S. 436, 444 (1912), that the law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."* See generally, 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478 (1981); 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.404 (2d ed. 1984). However, the doctrine of law of the case applies *only* with respect to issues determined earlier in the litigation. *Quern v. Jordan*, 440 U.S. 332, 347 n. 18 (1979). In this case, the Second Circuit ruled that the doctrine of law of the case prevented Judge Sweet from considering whether the plaintiff had *willfully* made a false sworn statement – a determination that was crucial under New York law and which *had not been made* earlier in the lawsuit. In so ruling, the Second Circuit placed itself in conflict with the decisions of this Court and several circuit courts.

In his initial ruling in this case, Judge Sweet determined that the statements at issue were inaccurate or false, but not material; he therefore never reached the issue of willfulness. (A-17). On appeal, the Second Circuit held that the statements were material

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* The duty of an inferior court to honor the mandate of a superior court is sometimes also referred to as the "mandate rule". See 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478, at 792-93 (1981).

and, therefore, reversed the district court. The panel made no findings, however, on the willfulness of the false statment. (B-12). Judge Sweet, in his opinion denying the petitioner's Rule 60(b) motion, noted that he had not addressed the issue of willfulness when the case first had been before him: "There was no such finding, only a finding that the testimony given was false." (C-3). And, in the decision below, the second panel of the Second Circuit conceded that the first panel to hear the case "did not purport to determine whether the false statements. . .were willfully made." (D-4). Nonetheless, while conceding that under New York law "a false statement made on an examination under oath must be both material and willful in order to void a fire insurance policy," the second panel held that the doctrine of law of the case precluded consideration of the issue of willfulness. (D-5-6).

By applying the doctrine of law of the case to a basic issue not decided earlier in the litigation, the Second Circuit placed itself in conflict with numerous other circuits. See, e.g., *Signal Oil & Gas Co. v. Barge W-701*, 654 F.2d 1164 (5th Cir. 1981), *cert. denied*, 455 U.S. 944 (1982); *Conway v. Chemical Leeman Tank Lines, Inc.*, 644 F.2d 1059 (5th Cir. 1981); *Key v. Wise*, 629 F.2d 1049, 1054-55 (5th Cir. 1980); *Holcomb v. United States*, 622 F.2d 937 (7th Cir. 1980); *United States v. Crow Dog*, 532 F.2d 1182, 1188 (8th Cir.), *cert. denied*, 430 U.S. 929 (1976); *Lathan v. Brinegar*, 506 F.2d 677, 691 (9th Cir. 1974).

Both *Conway v. Chemical Leaman Tank Lines, Inc., supra*, and *Holcomb v. United States, supra*, illustrate the rule, accepted explicitly in the Fifth, Seventh, Eighth and Ninth Circuits, that consideration of a relevant basic issue is not foreclosed as law of the case merely because an appellate panel has passed on related issues. In this case, it is plain that a required essential element of the defense — that the false, material sworn statement of the insured was willfully false — was never found at any point in the proceedings. The decision of the Second Circuit precluding consideration of that issue on the ground it was law of the case is therefore in clear conflict with decisions of other circuits on the proper scope of law of the case doctrine. Only this Court can resolve that conflict.

(2) The Second Circuit, Contrary to the Rule Adopted by the Majority of Circuits, Employed a Wooden and Inflexible Formulation of Law of the Case Doctrine

Assuming *arguendo* that, in the instant case, the doctrine of law of the case might have been applied to the issue of willfulness, the wooden and inflexible formulation of that doctrine adopted by the Second Circuit is ill-conceived and contrary to the formulation of that doctrine announced (in appropriate contexts) by other circuits. This Court has said that law of the case is a flexible doctrine and "merely expresses the practice of courts *generally* to refuse to reopen what has been decided, *not a limit* to their power." *Missinger v. Anderson*, 225 U.S. 436, 444 (1912) (emphasis added). It is a doctrine that requires discretion. *Arizona v. California*, 460 U.S. 605, 618 (1983); *Southern Ry. v. Clift*, 260 U.S. 316, 319 (1922). To that end, several circuits have adopted the formulation of the doctrine of law of the case offered by the Fifth Circuit in *White v. Murtha*, 377 F.2d 428 (5th Cir. 1967):

> The "law of the case" rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members," and that it would be impossible for an appellate court "to perform its duties satisfactorily and efficiently" and expeditiously "if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal" thereof.
>
> While the "law of the case" doctrine is not an inexorable command, a decision of a legal issue or issues by an appellate court establishes the "law of the case" and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, *unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law*

> *applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.*

377 F.2d at 431-32 (emphasis added). Even this Court has cited the *Murtha* test with approval:

> Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice. *See, e.g., White v. Murtha,* 377 F.2d 428, 431-432 (CA5 1967).

Arizona v. California, 460 U.S. 605, 618 n.8 (1983).

The *Murtha* test has been applied by the Sixth, Seventh, Ninth, and Eleventh Circuits. See e.g., *Westbrook v. Zant,* 743 F.2d 764, 768-769 (11th Cir. 1984); *Handi Investment Co. v. Mobil Oil Corp.,* 653 F.2d 391, 392 (9th Cir. 1981); *Chicago & North Western Transportation Co. v. United States,* 574 F.2d 926, 930 (7th Cir. 1978); *Petition of United States Steel Corporation,* 479 F.2d 489, 494 (6th Cir.), *cert. denied,* 414 U.S. 859 (1973). Similar formulations of law of the case doctrine have been employed by the Third, Eighth, and Tenth Circuits. See, e.g., *Delano v. Kitch,* 663 F.2d 990, 996 (10th Cir. 1981), *cert. denied,* 456 U.S. 946 (1982); *Zichy v. City of Philadelphia,* 590 F.2d 503, 508 (3d Cir. 1979); *Wrist-Rocket Manufacturing Co., Inc. v. Saunders Archery Co.,* 578 F.2d 727, 730-31 (8th Cir. 1978).

Zichy v. Philadelphia, 590 F.2d 503 (3rd Cir. 1979), is illustrative of the cases just cited. In that case, female employees of the City of Philadelphia brought a class action suit against the City, arguing that its maternity leave policy discriminated against women employees. Suit was based on 42 U.S.C. Section 1983 and Title VII of the Civl Rights Act of 1964. The district court entered summary judgment for the plaintiffs based on a Title VII violation. The Court of Appeals reversed the district court, "effectively dismissing all of their Title VII claims." 590 F.2d at 505. The court remanded to the district court "for the sole purpose of affording appellees an opportunity of presenting a proposed amendment to the complaint to add a state law claim. . . ." *Id.*

The district court denied the plaintiffs' motion to add a state law claim. *Id.*

On appeal, the plaintiffs argued that in light of an intervening Supreme Court opinion, *Nashville Gas. Co. v. Satty*, 434 U.S. 136 (1977), they should be allowed to raise Title VII claims despite the earlier appellate holding. The Court of Appeals agreed:

> This Court has a duty to apply a supervening rule of law despite its prior decisions to the contrary when the new legal rule is valid and applicable to the issues of the case. *Bradley v. School Board of Richmond*, 416 U.S. 696, 714, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974); *Ratay v. Lincoln National Life Insurance Co.*, 405 F.2d 286, 288 (3d Cir. 1968) (in diversity case, federal district court may veer from the "law of the case" set out by the Court of Appeals when the applicable state law has changed in the interim); *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 178 (2d Cir. 1967), *cert. denied*, 390 U.S. 956, 88 S.Ct. 1038, 20 L.Ed.2d 1151 (1968). Here, the Supreme Court's decision in *Nashville Gas Co. v. Satty* intervened between the first time the case was before us and this appeal. Therefore, we are not bound by our prior holding. We will remand to the district court for reconsideration of the Title VII claims in light of *Satty* and *Eberts*.*

590 F.2d at 508.

In the case at hand, the formulation of law of the case doctrine embodied in the *Murtha* case would have required a holding that Judge Sweet *could* consider the issue of willfulness. The *Murtha* test is applicable to the District Court's further consideration of a case on remand after the issuance of the mandate of the Court of Appeals (as in Rule 59 and Rule 60 motions):

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* The Third Circuit has adopted a similar approach in situations in which an intervening state supreme court opinion clearly shows a prior panel's interpretation of state law to be incorrect. See Comment, *The Role of Federal Courts in Changing State Law: The Employment at Will Doctrine in Pennsylvania*, 133 U. Pa. L. Rev. 227, 228 n.6 (1984).

> Compliance with an appellate court's mandate is normally required by the doctrine of law of the case; *the district court may disobey the mandate only where* "[1] the evidence on a subsequent trial [is] substantially different, [2] *controlling authority has since made a contrary decision of the law applicable to such issues,* or [3] *the decision was clearly erroneous and would work manifest injustice.*"

Tasby v. Wright, 713 F.2d 90, 96 n.7 (5th Cir. 1983) (Emphasis added). *See, e.g., Westbrook v. Zant,* 743 F.2d 764, 769 (11th Cir. 1984); *Offshore Logistics Services, Inc. v. Mutual Marine Office, Inc.,* 520 F. Supp. 237 (E.D.La. 1981). *See Morrow v. Dillard,* 580 F.2d 1284, 1289-92 (5th Cir. 1978); *Pierce v. Cook & Co.,* 518 F.2d 720 (10th Cir. 1975), *cert. denied,* 423 U.S. 1079 (1976). Both the second (intervening authoritative contrary law) and third (manifest injustice) of the *Murtha* exceptions apply to this case. For example, the second panel of the Second Circuit conceded that "according to the law of New York, a false statement made on an examination under oath must be both material and willful in order to void a fire insurance policy." (D-5). The first panel had treated materiality as the only relevant issue. The Second Circuit was forced to acknowledge that *both* materiality and willfulness were relevant because it had before it a controlling decision issued by the New York Court of Appeals after the first panel's treatment of the case. *Deitsch Textiles, Inc. v. New York Property Insurance Underwriting Assn.,* 62 N.Y.2d 999, 479 N.Y.S.2d 487, 468 N.E.2d 669 (1984). Nonetheless, the second panel of the Second Circuit adopted a wooden and inflexible formulation of the doctrine of law of the case and refused to permit Judge Sweet to *consider* the question of willfulness. In so doing, the Second Circuit disregarded the existence of the exceptions to law of the case doctrine built into the *Murtha* formulation; that circuit thereby placed itself in conflict with several other circuit courts.

This Court should address the conflict in the circuits created by the decision below and make the judicious *White v. Murtha* formulation of law of the case doctrine binding on all federal courts.

III

THE DECISION BELOW IS INCORRECT AND CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS REGARDING THE PROPER APPLICATION OF THE RULE OF *ERIE R.R. v. TOMPKINS*, 304 U.S. 605 (1938), TO SITUATIONS LIKE THE ONE BELOW

(1) The Decision Below Incorrectly Ignores Decisions of This Court and of Other Circuit Courts Holding That *Erie* Dictates That Where a Change in State Law Occurs *Pendente Lite*, the Federal Court Must Apply the Most Current Reading of State Law Available

Under the rule of *Erie R.R. v. Tompkins*, *supra*, federal courts are required to apply the law of the state in which they are sitting. In *Erie* itself, there was no necessity for discussing at what step in the development of litigation the state law would be finally determined. But, just three years after the *Erie* decision, this Court held that a judgment of a district court, governed by state law and correctly applying that law as interpreted by the state supreme court when the judgment was rendered, *must* be reversed on appeal if in the meantime the state court has disapproved of its former rulings and adopted a contrary interpretation. *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941). In the four decades since *Vandenbark*, most circuit courts have interpreted that decision to mean that in diversity cases federal trial and appellate courts are obliged to follow the latest authoritative pronouncements of state courts on the content of state law — even if those pronouncements are made *pendente lite*, and even if they are inconsistent with interpretations of state law announced earlier in the litigation by the federal trial or appellate court. See, e.g., *Maryland Casualty Co. v. Hallatt*, 326 F.2d 275 (5th Cir.), *cert. denied*, 377 U.S. 932 (1964); *Atlantic Coast Line R.R. v. Chance*, 198 F.2d 549 (4th Cir. 1951), *cert. denied*, 344 U.S. 877 (1952). The decision of the Second Circuit below represents an attempt, contrary to explicit holdings of other circuit courts, to use "law of the case" doctrine to circumvent this rule.

In *Atlantic Coast Line R.R. v. Chance*, 198 F.2d 549 (4th Cir. 1951), *cert. denied*, 344 U.S. 877 (1952), the Fourth Circuit made clear its view that a federal court is required by *Erie* to disregard the doctrine of "law of the case" in cases where a change in state law is made *pendente lite*. The Court held that:

> This is the second appeal in the case. . . and presents for our consideration no question not fully considered and passed upon in [the first] appeal. Under well settled principles, the law as there laid down became the law of the case which governs in subsequent appeals. While *the court has power on a subsequent appeal to reverse a former decision in the same case*, this is a power which will be exercised only under the most unusual circumstances, as where the Supreme Court of the United States has decided the same matter differently during the interim, or *where, in a case involving the interpretation of state law, the supreme court of the state whose law is involved has rendered a decision in conflict with the former decision.*

198 F.2d at 550 (emphasis added).

In *Maryland Casualty Co. v. Hallatt*, 326 F.2d 275 (5th Cir.), *cert. denied*, 377 U.S. 932 (1964), the Fifth Circuit reached the same conclusion. In *Hallatt*, which was a diversity case tried in a federal district court in Florida, the crucial question was whether the failure of an insured to attend the trial was prejudicial to the insurer. The trial court allowed introduction of evidence on the question of prejudice; but the court of appeals held such failure was prejudicial as a matter of law, reversed, and remanded for trial. After a new trial had produced a verdict and judgment for the insurance company, a Florida appellate court faced the question of law that had been decided in the *Hallett* case and held that the failure of the insured to attend the trial was *not* prejudicial — indeed, the Florida court specifically rejected the federal court's decision. When the *Hallatt* case came before the federal court of appeals for a second time, the insurance company argued that the circuit court should

adhere to its earlier ruling because it was the "law of the case." The Fifth Circuit flatly rejected this argument in language which is a direct rebuke to the decision of the Second Circuit in the case at hand:

> While *Erie* made the law of the State effective to govern tort cases cognizable in federal courts on the sole ground of diversity, there was no necessity there for deciding at what step the state law would be finally determined. As a general rule, the decision of an appellate court in a case establishes the law of the case, not only for trial upon remand, but also for the appellate court itself upon subsequent review. But this rule is not an inexorable command, and must not be used to accomplish an obvious injustice. We recognize that an appellate court's power to depart from its own ruling on a former appeal should be exercised sparingly and only in exceptional cases. This is an exceptional case. The litigation has not yet terminated. The initial error was our misapplication of governing state law. That error is revealed by an intervening clear enunciation from a Florida Appellate Court.
>
> *This Court has jurisdiction of and will correct an initial opinion where as here, between the date of the initial decision and the time we are again called upon to pass upon the same case, a controlling state court has made a decision that we were "dead wrong."* The Florida Court in *Barnes* has saved us from committing a miscarriage of justice. We are not insensible to possible complications but are of the opinion that under the total circumstances it is our duty to conform our decision to the supervening decision of the State Court, such decision being under *Erie* the right decision.

326 F.2d at 276-77 (emphasis added).

The decisions of the Fourth and Fifth Circuits in *Chance* and *Hallatt* manifest a sensitivity to the constitutional interest in

federal-state relations embodied in the *Erie* line of cases — a sensitivity that is completely absent from the decision of the Second Circuit in this case. In cases based on state law, federal courts at every level and at every stage of a suit *must* conform their interpretations of state law to the latest authoritative articulation of that law available. This Court so held in *Vandenbark*, *supra*. The Second Circuit, in this case, utilized the doctrine of "law of the case" to avoid its obligation to apply the interpretation of New York law announced by the New York Court of Appeals in *Deitsch Textiles, Inc.*, *supra*.* In *Chance* and *Hallatt*, the Fourth and Fifth circuits expressly (and, we submit, rightly) held that such a circumvention is impermissible. This Court should address this conflict among the circuits and make clear that the subversion of the *Erie* doctrine embodied in the Second Circuit's ruling in this case is unacceptable.**

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* Ever since the first panel of the Circuit Court made it an issue, the Petitioners have argued that a long line of New York decisions indicated the need for an explicit finding of willfulness before insurance coverage could be voided under New York law. The Respondent, however, defended the first panel's decision, arguing that such a showing was *not* necessary in a case like the one at hand. *See, e.g.*, Brief of the Appellee (to the second panel) at 17. As the second panel of the Circuit Court acknowledged, *Deitsch removed any doubt* that a finding of willfulness was required. For the Petitioner, this added decision was unnecessary to make this point of law clear; for the Respondent and the first panel of the Circuit Court, it clearly was. For the "Doubting Thomases," therefore, *Deitsch* was new law. But, new law or old, the Second Circuit was bound by *Erie* to follow it.

** It must be pointed out that the plaintiffs (Petitioners) were not the parties who brought this action into the Federal Courts. They instituted suit in the New York State Supreme Court. It was the out-of-state insurance company who removed the case to the U.S. District Court.

Small point? Not when the effect is for the case to be determined by a mistaken Federal view of the law of the State in which the claim arose — the *statutory* law of that state, in fact.

Forum-shopping underlies the entire policy issue behind *Erie R.R. v. Tompkins*, as well as directly affecting the result obtained in this case. Unless the Federal courts apply a "mirror image" of state court law, they encourage litigants — especially large institutional litigants like insurance companies — to shop for the forum most favorable to them, at the expense of the policyholder.

(2) The Decision Below Incorrectly Ignored Decisions of Other Circuit Courts Holding that *Erie* Dictates That Federal Courts, Sitting in Diversity, Apply State Rules on Former Adjudication

Assuming *arguendo* that the Second Circuit has the right to utilize the doctrine of law of the case to circumvent its obligation to conform its interpretation of state law to the latest authoritative articulation of state law available, its ruling nonetheless is inconsistent with *Erie R.R. v. Tompkins*, *Supra*. This Court has indicated in *dicta* and several circuit courts have held in cases based on state law that federal courts are obligated by *Erie* to apply state rules on former adjudication. In the decision below, however, the Second Circuit did not apply New York's rules on law of the case, but instead arrogated to itself the right to promulgate and apply a "federal" version of that doctrine.*

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* The issue here is not the *content* of the Second Circuit's vision of the doctrine of law of the case, but the *source* of that vision. It happens that the vision of law of the case adopted by the Second Circuit differs in significant ways both from that adopted by the courts of New York State (as is shown in the next paragraph of this note), and from that adopted by other federal courts in cases where a federal rule on law of the case was appropriate (as is shown in Part II(1) *supra*). The present issue, however, is limited to the important question of the *source* of rules on former adjudication in diversity cases.

New York's doctrine of law of the case is substantially different from that employed below by the Second Circuit. Under New York law, for example, it has long been established that law of the case does not prevent the reexamination of a matter determined in a prior appeal where the governing law has changed since the first appellate decision. *See, e.g., Matthews v. Matthews*, 154 N.Y. 288, 48 N.E. 531 (1897). This rule has since been consistently applied by the New York courts. *See, e.g., Foley v. Roche*, 85 App. Div. 2d 887, 447 N.Y.S.2d 528 (2d Dep't 1982); *Malnat v. Metropolitan Life Ins. Co.*, 254 App. Div. 681, 3 N.Y.S.2d 211 (2d Dep't 1938); *United States Mortgage & Trust Co. v. Ruggles*, 232 App. Div. 9, 248 N.Y.S. 525 (1st Dep't 1931). In *Foley v. Roche*, for example, the Appellate Division affirmed the grant by the State Supreme Court of a motion essentially made to reargue a prior order on the ground that the basis for the prior order had been overruled by decisions of the United States Supreme Court and the New York Court of Appeals. Rejecting the argument that the decision on a prior appeal was binding as law of the case, the court reasoned that "[t]he doctrine of law of the case is 'not an absolute mandate on the court,' since it may be 'ignored' in 'extraordinary circumstances,' " such as "a change in the law." 86 App. Div. 2d at 888, 447 N.Y.S.2d at 529.

Along with the doctrines of res judicata and collateral estoppel (or claim and issue preclusion), the doctrine of law of the case is a species of former adjudication doctrine. Not long after issuing its *Erie* decision, this Court, in *Heiser v. Woodruff*, 327 U.S. 726 (1946), noted (but did not determine) that the *Erie* decision *might* require application of state rules of former adjudication in diversity cases:

> We need not consider whether, apart from the requirement of the full faith and credit clause of the Constitution, the rule of *res judicata* applied in the federal courts, in diversity of citizenship cases, under the doctrine of *Erie*. . .can be other than that of the state in which the federal court sits.

327 U.S. at 731-32. Twenty-five years later, in a patent case, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), while discussing the requirement of mutuality (identity of parties) for the invocation of collateral estoppel, the Court indicated in *dicta* that in diversity cases federal courts were required to apply state rules of former adjudication:

> Many federal courts, exercising both federal question and diversity jurisdiction, are in accord (on dispensing with the mutuality requirement) *unless in a diversity case bound to apply a conflicting state rule* requiring mutuality.

402 U.S. at 325 (emphasis added). Just after this statement, the *Blonder-Tongue* Court provided a string of citations to lower court cases, all of which indicate that federal courts in diversity cases are required to conform to state doctrines of former adjudication.

Taking their cue from *Blonder-Tongue*, several circuit courts subsequently have reiterated the view that in cases based on state law *Erie* compels federal courts to apply state doctrines of former adjudication in determining the preclusive effect of former judgments and rulings (whether those judgments and rulings emanated from a state or a federal court). For example, in *Semler*

v. Psychiatric Institute of Washington, 575 F.2d 922 (D.C. Cir. 1978), a wrongful death judgment was secured in a diversity action in Virginia. A second diversity action was then brought in the District of Columbia seeking an additional recovery on a survival claim. The court applied Virginia law to conclude that claim preclusion merged the entire claim and prevented a second action:

> [We] believe that the principles of *Erie*. . . and the mandate of the Full Faith and Credit Clause as supplemented by 28 U.S.C. Section 1738 require a federal court exercising diversity jurisdiction in forum II to give to the judgment of a federal court exercising diversity jurisdiction in forum I the same full faith and credit that a state court in forum II would be obliged to give the judgment of a state court in forum I, at least in the absence of an overriding federal interest.

575 F.2d at 927-28. *Accord, Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 851 & n.17 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 994 (1982); *Gasbarra v. Park-Ohio Industries, Inc.*, 655 F.2d 119, 122 (7th Cir. 1981); *Gatzemeyer v. Vogel*, 589 F.2d 360, 362 (8th Cir. 1978); *Hayules v. Randall Motor Co.*, 455 F.2d 169, 173 (10th Cir. 1971); *Provident Tradesmens Bank & Trust Co. v. Lumbermems Mutual Casualty Co.*, 411 F.2d 88, 94-95 (3d Cir. 1969) (preclusion within the course of a single diversity action). *See also Rust v. First National Bank*, 466 F. Supp. 135, 138 (D. Wyo. 1979); *Stever v. Westvaco Corp.*, 450 F. Supp. 384, 2397 & n.16 (D. Mo. 1978) (preclusion within the course of a single diversity action); *Skryat v. Ford Motor Co.*, 389 F. Supp., 753, 574 n.1 (D.R.I. 1975).

In the case at hand, the Second Circuit arrogated to itself the right to promulgate and apply a "federal" doctrine of law of the case, and thereby adopted a view regarding the *source* of rules of former adjudication in diversity cases that conflicts with the cases just cited. A few other circuit courts similarly have held that *Erie* does not dictate the source of rules on former adjudication, even in diversity cases. See, e.g., *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151, 153 n.1 (5th Cir. 1974) (ignoring *Erie*'s impact on the rules of former adjudication, the Fifth

Circuit wrote: "[W]e have the rather anomalous situation of a federal diversity court deciding a controversy in which Congress has, by the exercise of its express and implied powers, federalized all relevant legal questions — a diversity case in which there are no issues of forum state law"); *Wayside Transp. Co. v. Marcell's Motor Express, Inc.*, 284 F.2d 868 (1st Cir. 1960).

Thus, the circuits are split on whether *Erie* commands federal courts sitting on diversity cases to employ state rules on former adjudication — and the Second Circuit's decision in this case places it at odds with the position expressed by this Court, though in *dicta*, in *Blonder-Tongue*. Commentators are also split on the issue. *Compare* Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741 (1976), *with* Burbank, *Interjurisdictional Preclusion and Federal Common Law: Toward a General Approach*, 70 Cornell L.Q. 625 (1985) (arguing, contrary to Degnan, that unless the Court overrules *Guarantee Trust v. York* and its progeny or Congress passes a statute, state rules on former adjudication must be followed in diversity cases on most issues). This Court should address this important conflict among the circuits, and this case provides a vehicle for doing so.

CONCLUSION

When presidential candidate John F. Kennedy spoke at the Friendly Sons of St. Patrick dinner in 1960, he told the audience that he once asked Cardinal Spellman whether he believed in Papal Infallibility.

"I don't know, Senator," the Cardinal replied. "He always calls me Spillman."

The pressures of appellate business in the Federal Courts have created a *de facto* Doctrine of *Judicial* infallibility in the United States Courts of Appeals.

Time was when the Supreme Court was the ultimate authority in the Federal Court System, not because it was infallible but because it was *final*. Now the Circuit Courts have become "infallible" because they are *final* in cases involving disputes between private litigants.

The problem is that unlike the Supreme Court, the Circuit Courts do not function as a full bench, but rather as *panels of three.* The luck of the draw often controls the outcome – one group of three judges will often decide a case differently than another three might have done.

On top of that, the Circuit Courts – unlike the Supreme Court – frequently use the services of visiting judges – sometimes District Judges from within the Circuit; sometimes (as here) visiting judges from outside the Circuit. In diversity cases involving State law, this can mean that the Judge who writes the opinion (as here) has had no prior experience with the state law which he is applying. He or she can therefore consistently overlook (as here) an essential element in state law which would produce a different result. Furthermore, where the judge writing the opinion comes from a distant part of the country (as here – California), it is unlikely that his or her law clerks in the home chambers have ready access to the law reports of the State whose law the judge is interpreting and applying.

Such a situation is a breeding ground for error – however unintentional – which can (as here) have a dramatic impact on the rights of the parties, and sometimes (as here) cause serious injury to the reputation of individual parties to the litigation.

That is why this Court should look at what went wrong with the Federal Court System here. If the Circuit Courts are the *final word* in diversity cases, how can we protect against their making mistakes in state law?

– Petitions for rehearing are ineffective.

– Petitions for certiorari are ineffective.

– Motions for new trials are ineffective.

This Court should grant certiorari here in order to lay down clear rules for more uniform "law of the case" exceptions, and for applying *Erie* when state courts enunciate state law while Federal court actions are pending. Future litigants should be spared the expense, delay and frustration of filing post-decision petitions and motions which are doomed to failure — no matter how meritorious — because of the rigidity of appellate court rules, as in the Second Circuit. In turn, this Court will thereby reduce its own caseload, as the Courts of Appeals provide the mechanism for more responsive error-correction in the federal judicial system.

The first step is to grant certiorari in this case, and then, after stating the proper standards for the future, remanding the case to the District Court to consider the Rule 60(b) motion on the merits and in its discretion.

Respectfully submitted,

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June 17, 1985

We express our appreciation to Prof. John E. Sexton of New York University Law School for technical information and research used in connection with the preparation of this petition.

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARTIN FINE, WILLIAM BECKER and PHILIP BECKER, individually and WILLIAM BECKER and PHILIP BECKER d/b/a BECKER & BECKER all doing business as 649 BROADWAY EQUITIES CO.,

Plaintiffs,

-against-

BELLEFONTE UNDERWRITERS INSURANCE CO., CITIBANK, N.A. and JOHANA ZUCKERMAN,

Defendants.

U.S. District Court filed Jan 3 1983 S.D. of N.Y.
80 Civ. 3747 (RWS) OPINION 54107

APPEARANCES:

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SWEET, D.J.

This is an intricate matrix of factual and legal issues involving insurance proceeds and arising out of a fire which totally de-

stroyed two buildings—649 and 653 Broadway in the early morning of February 14, 1979. Diversity jurisdication is present. Plaintiffs, New York owners, Martin Fine, William Becker and Philip Becker, individually, and William Becker and Philip Becker, d/b/a Becker & Becker, all doing business as 649 Broadway Equities Co., (collectively "Fine"), brought this action against the defendant Bellefonte Underwriters Insurance Co. ("Bellefonte"), a Delaware corporation with underwriting offices in Texas. Based on the following opinion setting forth the facts and conclusions of law, judgment will be entered on behalf of Fine.

Prior Proceedings

Fine initiated this action in the Supreme Court of the State of New York, New York County, on June 23, 1980, seeking recovery on a policy of insurance issued by Bellefonte for damages caused by the February 14, 1979 fire at the premises known as 649-51 Broadway, 653-55 Broadway, and 657-59 Broadway, ("649, 653, 657"). The action was removed to this court. Fine alleged eight causes of action against Bellefonte seeking recovery for damages under the fire insurance policy issued by Bellefonte for each of the premises (First, Third and Fifth causes of action), loss of rental (Second, Fourth and Sixth), debris removal (Seventh) and attorneys' fees (Eighth). Bellefonte in addition to its general denial alleged the affirmative defenses of breach of the protective maintenance clause, willful misrepresentation in connection with Bellefonte's investigation, failure of the Eighth cause of action to state a claim, and finally, failure to maintain the sprinkler system in the buildings as an increase of hazard suspending the coverage of the policy.

The action was tried by skilled and courageous counsel, one of whom was forced to interrupt the trial for heart surgery. In twenty-five trial days spread perforce over eight months, twenty-eight witnesses were presented as well as a substantial number of exhibits. Early in the proceedings, the selected jury was waived, and the evidence presented to the court. Final submissions were completed over a year after the commencement of

the taking of testimony in September, 1981. The proceedings were greatly aided by the skilled diligence of expert counsel who were comfortable and familiar with the issues and each other, a familiarity which enhanced the vigor of their presentation to the benefit of the court.

THE FACTS

In 1977 Fine contracted to purchase three buildings, 649, 653 and 657 Broadway for $1.3 million. The buildings were three contiguous five and six-story buildings with a stylistically unified marble and cast iron facade. They were located on the west side of Broadway in an area of lower Manhattan known colloquially as "NO-HO" (north of Houston Street). Their width varied from forty feet to fifty feet and they were uniformly two hundred feet deep, bordering on Mercer Street. There were separate addresses and elevators on the Mercer Street side. In total the buildings comprised approximately 158,000 square feet of space, above grade level (plus basements and subbasements), which had been divided into approximately seventeen lofts. The three buildings were operated as one and heated by one boiler located in the basement of 653 Building. Title passed to Fine in June, 1978.

The buildings originally were operated as the flagship store of the W & J Sloane Department Store in the late 19th Century, when that store led a move of merchants uptown, and contained many architectural details typical of the age, high ceilings, fenestrations, archs, facades, and a Victorian interior with wood and plaster decoration. The buildings were of stone construction and for the past twenty years had been leased to light manufacturing and some residential tenants. In 1978 and 1979 the buildings were occupied by tenants engaged in light manufacturing, warehousing, and in a few instances by artists in residence. The buildings were zoned for residential usage, and met the height and size, air and light requirements of the City for residential use.

Prior to purchase, Fine had retained an architect to determine and advise them of the feasibility of converting the build-

ings to residential occupancy, either as cooperative, condominium or rental apartments. Toward this end, the buildings were purchased, plans were drawn and filings made with the Attorney General's Office and the New York City Building Department, including but not limited to a presentation of the plans of conversion, applications and proposals. Fine had been granted a J-51 designation which carried with it certain tax benefits if a conversion to residential use was undertaken.

After the purchase Fine sought to obtain insurance covering thirty-one properties, of which 649, 653 and 657 were considered "key" by the underwriter. Kerwick & Curran ("K & C") were the insurance brokers consulted by Fine. They in turn sought to obtain the insurance from Bellefonte, a Delaware insurance company not admitted in New York, the underwriter for which had offices in Texas. Representations were made by K & C on behalf of Fine, and on October 3, K & C telexed to Bellefonte confirming coverage and other details with the expectation that the policy would be issued. There is no dispute with respect to terms of Bellefonte Underwriters Policy No. F-122374 issued to Martin Fine, William Becker and Philip Becker, et al, ("the Policy") except as to the increased hazard clause. The Policy was issued by Bellefonte on November 7, 1978, noting an inception date of October 11, 1978. The required premiums were paid.

The Policy provided:

> ". . . this Company . . . does insure the insured named above and legal representatives, to the actual cash value of the property at the time of loss . . . ."

The Supplemental Declarations Endorsement states:

> Location of premises, as stated in the Declarations, is extended to include the following and insurance is provided with respect to those premises described below:

24	649-51 Broadway New York, NY	Apts. & Merc.	Bldg.	400,000
			Rents	40,000
			Sprink	
			Lkge.	

Mortgagee: Citibank, N.A., 399 Park Ave., New York, N.Y.

25	653-5 Broadway New York, N.Y.	Merc. Mfg. Loft	Bldg.	600,000
			Rents	60,000
			Sprink.	
			Lkge.	67,000

Mortgagee: Citibank, N.A., 399 Park Ave., New York, N.Y.

26	637-9 Broadway New York, N.Y.	Merc. Mfg. Loft	Bldg.	700,000
			Rents	50,000
			Sprink	
			Lkge.	78,000

Mortgagee: Johanna Zuckerman, 10 West 33rd St., New York, N.Y.

The policy proposed by K & C on October 26 contained a "Clause 14" which follows:

> *14. Protective Maintenance.*
>
> It is warranted that the insured shall maintain in complete working order such protective systems and warning devices as existed at time of attachment of this policy, or which the insured has agreed to install, insofar as it is under insured's control or supervision, and that no changes shall be made in the said protective systems and warning devices without the consent in writing of this company.

Additionally, the policy, in New York standard form, contained the following provision:

> Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring (a) while the hazard is increased by any means within the control or knowledge of the insured.

The policy as issued also contained a Paragraph 16:

> *Privileges Granted:*
> To construct additions and to make alterations and repairs to the building(s) at the location(s) specified herein and to erect new buildings and structures at such location(s).

However, the proposal forwarded in October by K & C contained a Clause 16, *Permits and Agreements*, which would have granted permission for "existing and increased hazards."

K & C complained to Bellefonte with respect to the change in Clause 16 in the Policy as issued from their proposal for increased hazard. Telephone conversations were exchanged. On January 18, 1979 Bellefonte issued an Endorsement No. 3 which contained the following language:

> It is hereby understood and agreed paragraph 16. *Privileges Granted* contained in the policy is deleted in its entirety and the wording below is substituted therefor:
>
> 16. *Permits and Agreements:* Permission granted (a) for such use of the premises as is usual and incidental to the business conducted therein and for change in use or occupancy except as to any specific hazard, use or occupancy prohibited by the express terms of this policy or by any endorsement thereto; (b) to keep and use all articles and materials, usual and incidental to said business in such quantities as the exigencies of the business require; (c) for the building(s) containing property covered hereunder to be in course of construction, alteration, or repair, all without limit of time, but without extending the term of this policy, and to build additions thereto, and this policy, under

its respective item(s) shall cover such additions in contact with such building(s).

This insurance shall not be prejudiced (1) by any act or neglect of the owner of the building(s) if the insured is not the owner thereof, or by any act or neglect of any occupant of the building(s) other than the named insured, when such act or neglect of the owner or occupant is not within control of the named insured; (2) by failure of the named insured to comply with any warranty or condition contained in any form, rider or endorsement atached to this policy with regard to any portion of the premises over which the named insured has no control.

No further correspondence or communication was had on the subject until after February 14, 1979, the date of the fire.

After purchasing the buildings Fine placed their day-to-day management in the hands of Horatio Management Co., the business of which was conducted by George Peters, its managing agent. Alex Aloisio ("Aloisio") remained the superintendant at 649, 653 and 657. In order to get possession of the buildings for conversion, Fine did not renew expiring leases, and by February 1979 only one-third of the building was occupied on short-term leases. Changes in the operation of the heating system were adopted, which might be characterized as a "freeze-out" policy, are more fully described below.

The sprinkler systems in 649 and 653 were wet pipe constant pressure systems, that is, systems filled with water under pressure when not in use. There was a gravity tank on the top of 653, with a 10,000 gallon capacity, which sat atop of a pressure tank of 6,500 gallon capacity under 75 pounds of pressure per square inch which was in an enclosed and heated portion of the building from which down risers extended into the basement. There was a connection with a line which came in from the siamese fittings outside the building, fittings which enable the Fire Department to connect a hose line to the fittings and pump water into the system if all was working properly, which it did not on the night of February 14, 1979. The basement intercon-

nections at the time of the fire between the 649 and 653 systems and the lines coming from the street siamese connections were never established. 657 had its own separate sprinkler system.

Risers took the water from the basement to the sprinkler system on each floor which consisted of sprinkler heads and pipes suspended from the ceiling. In the event of a temperature exceeding 160-165 degrees, the sprinkler heads would fuse and open, and the head would distribute all the water in the pressure and gravity tanks. The system would continue to operate after the tanks were exhausted if fed by the Fire Department through the siamese fittings outside the building. Such a system normally serves to retard a fire sufficiently to permit its extinguishment in almost all conditions experienced by the New York City Fire Department except where arson is involved. The number of sprinkler heads per square feet were well above an industry minimum of one sprinkler head for every 64 square feet.

This sprinkler system was monitored by three controls, one on the water tank on 653 which would electronically sense a drop in pressure in the pressure tank and send an alarm to a central station, a second control which was activated by a drop below freezing on the water tank on 657, and most significantly, as it turned out, a water flow alarm sprinkler system in the basement of 653. The signals relating to 649 and 653 were leased from Honeywell Protective System, Inc. and those for 657 from AFA Protective Systems, Inc. The water flow alarm in the basement was operated by a flow of water across the extended flexible paddles of a Potter valve, bending the paddles and thus completing an electrical circuit which then transmitted an alarm over leased wires to the central station which in turn transmitted the alarm to the Fire Department whenever it was deemed appropriate to do so. There were no outside contractors with a duty to maintain the sprinkler system.

After the purchase of the buildings by Fine no changes were made in this system. Aloisio was licensed by the City to perform sprinkler maintenance, had done so before Fine's purchase, but had not made any inspections since the date of purchase. A

report of an inspection by the Fire Department of the sprinkler system in the fire buildings on October 30, 1978, which was three weeks after the inspection and one week before the Policy's issuance, indicates that the system on that date was found to be "satisfactory."

However, the new owners did make changes in the operation of the heating system by reducing the temperature range of the heat timer. This device measured the outside temperature and turned on the boiler whenever the temperature was within a specified range. Under the prior owners the lower limit of the range was 40 degrees. Fine through his managing agent directed a change to a lower limit of 25 degrees, although in fact Aloisio set the temperature at 30 degrees. Aloisio also testified that there were internal controls limiting the periods during which the boiler operated, even if the boiler had been activated by the heat timer. Fine through his managing agent instructed Aloisio to turn off the heating from 11:00 a.m. to 2:00 p.m. and Aloisio implied that there were additional restrictions on the time during which the heating system operated. The testimony as to the details of this restriction were unclear.[1] As a consequence of the heating policy adopted by Fine, there were consistent complaints from the tenants about the lack of heat. It is a fair inference that Fine sought to minimize his expenses and to discourage his tenants in an effort to gain control of the buildings for renovation into a more profitable use, and that this freeze-out policy had had some effect in that regard. However, there was no testimony that these changes in the operation of the heating plant in the building were outside of acceptable industry standards or were such that a reasonable person would anticipate that the water contained in the sprinkler system would freeze.

From January on in 1979 the weather was particularly cold and during this period the boiler functioned properly, until February 6. Then the boiler failed to operate principally because of electrical problems which were repaired by the replacement of fuses, an occurrence which was repeated on the 7th and 8th and resulted in a change of wiring on the 9th.[2]

The temperature ranges from February 1, 1979 to February 14, 1979 were as follows:

February Date	*Maximum*	*Minimum*	*Average*
1	30	22	26
2	33	22	28
3	36	24	30
4	41	25	33
5	28	18	23
6	29	16	23
7	25	22	24
8	34	20	27
9	24	9	17
10	21	6	14
11	16	3	11
12	19	5	12
13	19	6	13
14	17	3	10

A number of tenants complained about inadequate heating and the necessity of wearing heavy clothing in order to keep warm.

On February 11, 1979 in the early hours there was a fire in the Infinity Discotheque which occupied the basement of 653. The sprinkler system operated, an alarm was received, the Fire Department was notified and responded. There was no substantial damage. Later that day Aloisio received a call from Honeywell concerning a signal it had received due to a manual fire alarm for building 653 (this being the result of a small fire in the first-floor hallway adjacent to the premises occupied by Infinity Disco). At that time, Aloisio spoke with personnel of Allen Sportswear, Inc. which occupied premises in 657, who informed him that, as he himself observed, the building was without heat.

The following Monday, February 12, Aloisio observed frozen radiators near the windows on the third floor of 649. He also learned that water was leaking from the condensation pumps in the basement of 657 and, in order to avoid losing water from the heating system for the other buildings, he shut off the king valve which supplied steam from the boiler to building 657. He deter-

mined that the water was leaking from the condensation pump because water in the heating pipes had frozen. From that time on, about 3:30 p.m. on February 12, 1979, until the fire, near midnight on February 14, no heat whatsoever was supplied to 657. However, according to Aloisio, the boiler functioned on February 12, 13 and 14.

On the morning of February 14, a sprinkler head near a window on the fifth floor of 649 froze and began to leak. Aloisio informed the central station that repairs would be undertaken, and the sprinkler on that floor was shut off during the period of repair.

At 11:54 p.m. on February 14, 1979 a sprinkler flow alarm was received at Honeywell headquarters. The Fire Department was notified and responded. When Battalion Chief Lee approached the building from the Broadway side he saw a certain amount black smoke issuing from the 3rd floor of 653 which indicated to him that a substantial fire was in progress.

Chief Lee in company with Lt. Nixon of Ladder Company 9 went to the fire floor, covered by a hose line and forced entry into the space leased to Lion Leather. After crawling some forty feet into the space, the smoke followed by the heat grew so intense that Chief Lee and the men of Ladder 9 were forced to leave the floor. Both Chief Lee and Lt. Nixon of Ladder 9 agreed that the heat was sufficient to have fused the sprinkler head and that the sprinkler was not operating.

Chief lee went out to the landing, down the stairs, and out to the street where he noticed Engine Company 33 had lines into the siamese fittings of 653 and 649. Since he believed the line to be charged, that is, filled with water under pressure from the pumper, and since he had observed no sprinkler discharge when he was on the fire floor, he then went to the basement seeking to locate a main valve with the expectation that the main valve had been shut. He failed in this undertaking. Some distance from the Broadway side of the building in the basement he heard a churning noise which he believed to be a block in the sprinkler line. Chief Lee after being advised that the pumper was overheating directed the men in Rescue Co. No. 1 to

continue the search for the main valve. Chief Lee returned to the street to supervise the effort to contain the fire which continued to spread.

Rescue Co. No. 1 evacuated tenants from the fifth floor of 649 by ladder, having found it impossible to enter the building. Within the first fifteen to twenty minutes all hands were engaged in fighting the fire, successive alarms had been given, and Chief Lee had been relieved from overall responsibility by higher ranking officers who had arrived at the scene. The fire continued substantially unabated in 649 and 653 until the following morning. The buildings were almost completely burned out by the time the fire was extinguished. 657 was relatively unharmed, except for smoke and water damage.

No sprinkler was observed to operate by any fireman in 649 and 653, notwithstanding the operation of the sprinkler flow alarm at 11:54 which gave the first alarm of the fire. The Fire Department reports establish the standpipe system in 657 operated and was not frozen.

A great deal of testimony was taken from the firemen present and from the experts from both sides. Most persuasive was the eye-witness testimony of the fire fighters and the testimony of experts on sprinkler operation, including the fire fighters, which established that had the sprinklers functioned normally, the fire could have been controlled.

As a result of the extent of the fire, there was no tangible evidence by which the reason for the failure of the sprinklers could be established. Various theories were advanced, that the tank on 653 was frozen (the tank on 657 apparently did not freeze, no alarm having been received), that the down risers froze (the water flowed to activate the sprinkler flow alarm and the 657 standpipes were not frozen), that there was a blockage in the basement (the sprinklers in neither building operated), and that the sprinkler system on the fire floor was shut off by an arsonist (there was no evidence that the sprinklers worked on any floor of 649 or 653). After all the Fire Department reports had been completed, a critique of the operations of the Department during the fire was held by officers of the Department,

and it was concluded tha the origin of the fire was incendiary. Here again, however, the inconsistency of the operation of the water flow alarm remained unresolved.

The most persuasive theory advanced is either that the system was partially blocked by ice and that when the fire melted the sprinkler heads on the third floor there was enough fluidity in the system for some water to flow, enough to activate the alarm in the basement (an undeniable event), but that thereafter the system became blocked, presumably by ice, so that when Chief Lee arrived in the basement, he heard a churning noise that resulted when the water supplied by the pumpers on the street failed to proceed through the system because of the block. Indeed Chief Lee sought, but failed to locate, the shut-off valve, believing as he did at the time of the fire that perhaps the entire system had been turned off as indeed it had been at one time, since on the afternoon of the February 14, plumbers working in 657 had shut off the king valve.

It is plausible that the furnance broke down on the evening of February 14 as it had previously on the occasions described, and because of the extreme temperature, the sprinkler system froze at least partially, not enough to prevent the flow alarm to operate initially but sufficiently to block the line after a brief initial flow. It is also possible to infer that there was a frozen section in the lines above the third floor between the tanks and the water flow alarm with the result that the release of pressure from a fused sprinkler on the third floor of 653, the fire floor, caused turbulence in the line and a release of pressure downstream of the paddles in the potter valve sufficient to activate the water flow alarm.

However, because of the state of the physical evidence, the confusion of the events during the progress of a major fire and the lack of specific facts, as opposed to inference with respect to the cause of failure of the sprinkler system, Bellefonte has failed to establish by a preponderance of the evidence that Fine's heating practices were a proximate cause of the failure of the sprinkler system to work. Indeed, the combination of the operation of the flow alarm and the failure of the sprinkler system

constitute an unsolved puzzle, a riddle to which no preponderant answer has been supplied.

In addition there was insufficient evidence from which it could be found that Fine's heating practices violated any established norm. There was evidence uncontroverted that the heat timer operated and that the outside temperature was such as to have activated the furnance. Although Bellefonte urges that the boiler was shut off during 55 minutes of each hour, no record citation of the assertion has been found, and there is no direct statement to this effect in the testimony of Peters or Aloisio, the only two witnesses with direct knowledge of the heating practice employed after Fine's purchase of the buildings. While the buildings were underheated in terms of comfort, there was no testimony that a freeze-up could reasonably have been anticipated in light of customary practices.

Under the Policy, Bellefonte had the right to investigate and compel the examination of the insured concerning the loss. This examination was conducted and George Peters testified on November 27, 1979 and Martin Fine on August 3 and 30, 1979.[3] Their testimony was false with respect to the limits set on the heat timer, both having testified that the lower limit of the range was 40 degrees while Aloisios testified, correctly I find, that the lower setting was 30 degrees and that he had been instructed to set the lower limit at 25 degrees. Since Aloisio was a credible, although occasionally confused witness, and since he was the individual who actually did the tasks about which the testimony was given, his version is credited.

Also both Fine and Peters testified that Aloisio was charged with sprinkler maintenance, while Aloisio on the stand stated that he had not been given any instructions in that regard and in fact had not made the inspections and maintained the records as he had done under the direction of the prior owner of the building. Again, I credit Aloisio as the person with the direct responsibility, and find Peters and Fine's statements with respect to sprinkler maintenance to have been inaccurate and consequently false.

There is little dispute as to the facts relating to the "actual cash value at the time of the loss" of the buildings, but of course, there are widely differing views as to the implication of these facts. In November, 1979 a contract of sale was executed calling for the purchase of the buildings for $1.3 million, a transaction which was completed the following June. In June of 1979, the buildings in their demolished condition (the facade alone having been preserved) were sold for $2.0 million.

The price per square foot of comparable properties sold in the area is $16-18 per square foot as testified to by Bellefonte's expert whose testimony was credible and persuasive. Using a square footage of 151,717, the fair market value on that basis amounted to $2.5 million, a considerable increase over the arms length transaction less than a year before. Testimony was presented that real estate prices continued to rise during the period in question, testimony which was unchallenged but also imprecise. Fine's expert, using different sales and properties but basically the same type of analysis, concluded that the property had a fair market value of $3,680,000.

The property was properly zoned for a conversion to an apartment dwelling and it had been granted a J-51 designation which would apply even after the fire. The property had unique architectural qualities, as described above. The property operated at a loss of $31,000 in 1978. The net profit after conversion projected by Fine was $4.5 million.

Using tax assessment ratios and other considerations, the valuation experts estimated the ratio of land to building value to be from 33% to 41% of the market value.

It was undisputed that the cost to replace the buildings estimated at $1.5 million for 649 and $2.0 million for 653 exceeded the policy limits, and Bellefonte does not urge a replacement cost limitation on the court.

Relying on the range provided by the experts, I find that 37% of the total value is attributable to land and that such a ratio appropriate and within industry standards. I also find that based upon comparable market values, the market value of the land and property on February 14, 1979 was $2,500,000.

CONCLUSIONS OF LAW

There are seven issues of law to be resolved in light of the facts as found above:

1. Did false swearing void the Policy?

2. Which Clause 16 applies and does it make Clause 14 inapplicable with respect to a freeze-up?

3. Did Clause 14 operate as a warranty?

4. Was Clause 14 violated?

5. Was the hazard increased in violation of Clause 16?

6. What is the measure by which the "actual cash value" is determined?

7. Was Bellefonte's conduct vexatious and without reasonable cause?

For the reasons set forth below I conclude that the false swearing did not void the insurance policy, that Clause 16 as set forth in Endorsement No. 3 is applicable, that Clause 14 is a warranty, that it was not violated, that the hazard was not increased in violation of Clause 16, that actual cash value of the buildings is $1,575,000 and that Bellefonte's conduct has not been vexatious or without reasonable cause.

THE FALSE SWEARING

Bellefonte has urged that the policy is void as a result of the false testimony given by Fine and Peters in the course of the investigation of the loss pursuant to the Policy. Viewed most charitably, Fine and Peters were mistaken in their testimony. Both testified falsely that the nighttime setting for the heat timer was 40 degrees as I have found above, but the matter does not end there.

The relevant provision of the Insurance Law § 168(6) (McKinney 1966) provides that the form of the standard fire insurance policy shall include the following paragraph:

> *Concealment, fraud.*
> This entire policy shall be void, if whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating hereto.

From the plain language of this provision, the resolution of the affirmative defense of fraud turns on the materiality of the fact concerned, simply its falsity or inaccuracy. *See also Claflin v. Commonwealth Insur. Co.*, 110 U.S. 81, 94 (1883) (a false answer must be "material to the inquiry."); *Werber Leather Coat Co. v. Niagara Fire Insur. Co.*, 254 A.D. 298, 299, 5 N.Y.S.2d 1 (2d Dep't. 1938) (must find a "willful misrepresentation of a material fact"); *Oppenheimer v. Washington Assurance Corp.*, 244 A.D. 234, 235, 278 N.Y.S. 298 (1st Dep't 1935) (must find "concealment and misstatement under oath of material facts"); 31 N.Y. Jur. § 1298 (must find "false statements willfully made with respect to a material matter").

Here the statements were not material to the investigation. Given the extreme temperatures during the period from February 5th to February 14 as noted above, whether the heat timer setting was 25 degrees, 30 degrees or 40 degrees would not have affected the operation of the heating system. Further there was no testimony that a 25 degree or 30 degree setting would have constituted a practice which would have reasonably been foreseen to result in a freezing condition, which, in turn would have made the sprinkler system inoperative.

Similarly with respect to the sprinkler maintenance issue, whether Aloisio was instructed to perform maintenance on the sprinkler system or not, in fact he did take the action necessary to repair the system, and there is no indication in this record that any failure of record keeping or regular maintenance was in any way responsible for the freeze-up. Since the Fine policy of freeze-out has not been proved to be the cause of the freeze-up, the false statements, viewing them as such, were not material as contemplated under section 168.

THE APPLICABLE CLAUSE 16 DOES NOT BAR THE AFFIRMATIVE DEFENSE BASED ON CLAUSE 14

In an effort to counter Bellefonte's breach of warranty affirmative defense, Fine seeks to rely on the "Permissions and Agreements" clause proposed by K & C in October, 1978, claiming that any additional hazard such as the freeze-up of the sprinkler system was exempted by that clause and that Fine never agreed to the substituted Clause 16 contained in the Policy.

The Policy on its date of issuance was in proper form, and at no time was it rejected, nor was the repayment of the premiums sought, nor any action taken to cancel the Policy. However, renegotiation of Clause 16 was sought by Fine through its insurance broker and objected to by Bellefonte, by way of a third version. Fine, after initiating renegotiation, never objected to that version.

Such action fails to establish the October version proposed by K & C as the controlling provision, and if anything, establishes that the final version became part of the policy. *Cf. Mellor v. Budget Advisors, Inc.*, 415 F.2d 1218 (7th Cir. 1969) (ratification of contract results if party who has executed contract under duress remains silent or acquiesces in contract); *Security Underground Storage Inc. v. Anderson*, 347 F.2d 964 (10th Cir. 1965) (where party to contract remains silent as to claimed invalidity of contract and continues to treat as his own property which was subject of contract, he will be deemed to have waived his objection and will be bound by instrument); *Gateway Co. v. Charlotte Theatres*, 297 F.2d 483 (1st Cir. 1961) (buyer sent contract back to seller with cover letter directing attention to a modifying proposal to which seller did not respond and court held that parties had modified their original contract). Therefore I conclude that from October 11, 1978 to January 9, 1979, the Policy was in effect as written and after January 9, in effect as modified by Endorsement No. 3. There is no serious contention by Fine that Endorsement No. 3 vitiates the requirements of Clause 14.

CLAUSE 14 WAS A WARRANTY

As found above, the applicable clause relating to protective maintenance was as follows:

> 14. *Protective Maintenance*. It is warranted that the insured shall maintain in complete working order such protective systems and warning devices as existed at time of attachment of this policy, or which the insured has agreed to install, insofar as it is under the insured's control or supervision, and that no change shall be made in the said protective systems and warning devices without the consent in writing of the company.

In New York the enforceability of such a warranty is governed by Insurance Law § 150 (McKinney 1966). Section 150(2) provides as follows:

> No breach of warranty shall avoid an insurance contract or defeat recovery thereunder unless such breach materially increased the risk of loss, damage or injury within the coverage of the contract.

As observed in *Glickman v. New York Life Ins. Co.*, 291 N.Y. 45, 51, 50 N.E. 2d 538 (1943) "in section 150 the Legislature was seeing to it that a policy of insurance will not be avoided by proof of an immaterial 'breach of warranty.' " A breach of the warranty clause as applied to the sprinkler system in the subject buildings would be material. *See Irv-Bob Formal Wear Inc. v. Public Service Mutual Ins. Co.*, 81 Misc.2d 422, 366 N.Y.S.2d 596 (Civ. Ct. Queens County 1975), *aff'd* 86 Misc.2d 1006, 383 N.Y.S.2d 832 (App. Term 1976).

The warranty in this instance is promissory in character and although it does not specifically provide that the policy will be voided or the coverage suspended in the event of a breach of the warranty, a material breach would result in a forfeiture of the policy coverage notwithstanding the absence of such a "forfeiture clause." *See Appleman, Insurance Law and Practice*, Vol. 12A, § 7355 (1981).

Fire insurance policies have been held void due to a violation of a clause requiring:

> that, insofar as the sprinkler system and water supply therefor are under the control of the Insured, due diligence shall be used by the Insured to maintain them in complete working order.

Buehler Corp. v. Home Ins. Co., 358 F.Supp. 15, 16 (S.D. Ind. 1973), *aff'd* 495 F.2d 1211 (7th Cir. 1974). Failure to maintain the sprinkler system in operative condition was also deemed a material breach sufficient to void an insurance contract in *Bd. of Educ. of Charles County v. St. Paul Fire & Mar. Ins. Co.*, 420 F.Supp. 491 (D.Md. 1975), *aff'd* 544 F.2d 751 (4th Cir. 1976).

No particular form of words is essential to the creation of a warranty in an insurance contract. Any statement or description which relates to the risk, particularly if (as in this case) it is expressed as a warranty, will be enforced as a warranty. 30 N.Y. Jur. Insurance § 928. It is stated in 12A Appelman, *Insurance Law and Practice* § 7355 that:

> Where a statute requires materiality to be shown upon a breach of warranty, this result will follow if the matter is material though no forfeiture clause is present, although the breach of an immaterial provision will not matter, the statute expressly requiring in that event that a provision for avoidance be shown to exist.

The principle enunciated in Appelman above is explicitly applicable under Insurance Law § 150.

The courts of this state have consistently held that the consequence of a material breach of warranty is to defeat recovery without regard to whether or not such a consequence is explicitly spelled out in the policy. *See Clemans v. Supreme Assembly Royal Society of Good Fellows*, 131 N.Y. 485, 30 N.E. 496 (1892); *Sirvint v. Fidelity & Deposit Co. of Maryland*, 242 A.D. 187, 272 N.Y.S. 555 (1st Dep't), *aff'd per curiam*, 266 N.Y. 482, 195 N.E. 164 (1934); *Graley v. American Eagle Ins. Co.*, 235 A.D. 490, 257 N.Y.S. 566 (4th Dep't 1932); *Fidelity & Casualty*

Co. v. Codelle, 25 Misc. 2d 472, 207 N.Y.S.2d 846 (Sup. Ct. N.Y. County 1960). Since Clause 14 under this authority must be considered a warranty, the next inquiry must be directed to Bellefonte's claim of breach.

THERE WAS NO BREACH OF WARRANTY

Under the facts found above, Bellefonte has failed to establish that the Fine freeze-out policy resulted in a freeze-up on February 14 which prevented the operation of the sprinkler system. Perhaps that result was produced by a boiler malfunction, an arsonist's act, a plumber's mistake, together with the extreme temperature. The evidence was not preponderant that the low temperature policy Fine adopted, which undeniably caused discomfort to his tenants, resulted in the sprinkler system freeze-up, particularly in view of the operation of the standpipes in 657 and the non-activation of the heat alarm in its roof-top tank. Therefore Bellefonte failed to establish that protective maintenance clause was breached.

THERE WAS NO INCREASED HAZARD

The policy provided that Bellefonte would not be liable for a loss occurring "while the hazard is increased by any means within the control or knowledge of the insured." Bellefonte on the eve of trial asserted an affirmative defense based on this clause and asserted that the freeze-out policy resulted in an increase in hazard, or in the sprinkler system malfunction, which bars Fine's recovery.

In *Plaza Equities Corp. v. Aetna Casualty and Surety Co.*, 372 F.Supp. 1325, 1331 (S.D.N.Y. 1974), the court stated:

> An increase of hazard occurs only when the insured performs acts which are *reasonably calculated to increase the risk* and which he knows or should know will increase the risk. The negligence or misjudgment of the insured . . . is insufficient (emphasis added).

Similarly, Appelman explains that:

> An increase of hazard occurs when the insured is guilty of some act or acts *reasonably calculated to increase the risk, and which actually did increase it* . . . (emphasis added).

Appleman, supra, at vol. 5, § 2941. Had there been evidence that the sprinkler system was inoperative and that Fine had no intention of fixing it, a finding of increased hazard might have been in order. *Cf. Brooks Upholstering Co. v. Aetna Insurance Co.*, 149 N.W.2d 502 (Sup. Ct. Minn. 1967) (although new trial granted, finding of increased risk of loss by fire indicated that jury had found that a sprinkler system and been turned off and intentionally left off). However, such is not the case here. There was no testimony that the change in heating policy could have been anticipated to make the sprinkler system inoperative. Indeed, the system had functioned during the fire at the discotheque on February 11; there was water leakage on the fifth floor at 649 the day of the fire in question; and Aloisio testified that the sprinkler system was operative on February 14th.

As indicated earlier, the burden of proof to establish this defense falls upon Bellefonte and it has not been met. Bellefonte has failed to establish the type of increased hazard which would vitiate the policy under the cited authorities.

THE MEASURE OF ACTUAL CASH VALUE

The policy provided:

> . . . this Company . . . does insure the insured named above and legal representatives, to the *actual cash value* of the property at the time of loss. . . . (emphasis added).

The policy this involved is an "Open Policy" as opposed to a "Valued Policy." 1 G. Richards Law of Insurance, § 21 at 74-75 (5th ed. 1952). The fundamental difference between a Valued Policy and an Open Policy is explained as follows:

> [T]he Valued Policy estimates not merely the value of the property or interest insured, but values the loss

> and is equivalent to an assessment of damages, or perhaps is in the nature of liquidated damages in case of total loss of the property. This definite valuation is placed upon the insured property, presumptively after a preliminary inspection and appraisal of the property by the insurer.
>
> On the other hand, the Open Policy is a contract in which a certain agreed upon value or sum, written also on the face of the policy, is only the maximum limit of recovery in case of loss of the insured property; the amount of recovery is necessarily the "actual cash value (ACV) at the time of loss," which sum or value represents true indemnification for the loss sustained. Under an Open Policy, which is by far the prevailing form of property insurance contract, the insurer is permitted to introduce evidence that the property was over-insured or that the agreed upon sum represents more than the true worth of the property.

Id. (footnotes omitted). As stated in *Valuation and Measure of Recovery under Fire Insurance Policies*, 49 Colum. L. Rev. 818 (1949): "Unless the policy is valued, the sum set forth upon its face is intended merely as the maximum limit of the insurer's liability, not the measure of it."

In *McAnarney v. Newark Fire Insurance Co.*, 247 N.Y. 176, 159 N.E. 902 (1928) the Court of Appeals stated: "We interpret 'actual cash value' to have no other significance than 'actual value' expressed in terms of money." *Id.* at 181. The court then continued:

> Indemnity is the basis and foundation for all insurance law. (*Castellain v. Preston*, 11 Q.B.D 380; Richards on *Insurance Law*, p.27; Wood on *Fire Insurance*, sec. 471). "The contract of the insurer is not that, if the property is burned, he will pay its market value, but that he will indemnify the assured, that is, save him harmless or put him in as good a condition, so far as practicable as he would have been in if no fire had

> occurred." (*Washington Mills Mfg. Co. v. Weymouth Ins. Co.*, 135 Mass. 503). . . . To insure is "to guarantee or secure indemnity for future loss or damage." (The Century Dictionary.) Where insured buildings have been destroyed, the trier of fact may, and should, call to its aid, in order to effectuate complete indemnity, every fact and circumstance which would logically tend to the formation of a correct estimate of the loss. It may consider original cost and cost of reproduction; the opinions upon value given by qualified witnesses; the declarations against interest which may have been made by the assured; the gainful uses to which the buildings might have been put; as well as any other fact reasonably tending to throw light upon the subject (Sedgwick on Damages, sec. 722; Wood on *Fire Insurance*, sec. 472; *State Insurance Co. v. Taylor*, 14 Colo. 499; *Citizens' Bank v. Fitchburg Fire Ins. Co.*, 86 Vt. 267; *The H. F. Dimock, supra; Washington Mills Mfg. Co. v. Weymouth Ins. Co., supra; Shattuck v. Stoneham Branch R.R. Co.*, 6 Allen, 115; *Swan v. Middlesex Co.*, 101 Mass. 173; Wigmore on *Evidence*, sec. 1943).

Id. at 184-85.

In *Sebring v. Firemen's Insurance Co.*, 227 A.D. 103, 237 N.Y.S. 120 (1929) (per curiam), the Appellate Division, in reversing a judgment for the plaintiff, stated:

> "Actual cash value" means "actual value" expressed in terms of money. That real value constituted the measure of damages to which plaintiff was entitled, if he was entitled to anything. (*McAnarney v. Newark Fire Ins. Co.*, 247 N.Y. 176).
>
> Cost of reconstruction of the burned buildings, less depreciation, is one of the elements which go to make up "actual value." It is not, however, the exclusive and only method by which that value can be ascertained. The trier of the fact, charged with the duty of ascertaining the damages which an insured has sus-

> tained when his buildings have been burned, is entitled to consider for what it is worth any fact which reasonably tends to throw light upon that subject. This would include the purchase price of the property, if it was bought within a reasonable period prior to the fire, the opinion of experts as to its value, etc.

Id. at 103-04. The court then concluded:

> "The learned trial court excluded certain evidence offered by appellant which we think tended to shed some light on the question of value, and which the jury would have had a right to consider had it been in the case. This, we think, was error. We also think that the learned court erroneously instructed the jury that, as matter of law, the reconstruction value of the building destroyed, less depreciation, was the measure of damages to which the plaintiff was entitled. That was not the exclusive method by which plaintiff's damages could be ascertained. The jury could have taken into account any fact reasonably tending to shed any light on the question. We cannot say that these errors were harmless. For this reason, we think that the judgment appealed from should be reversed and a new trial granted.

Id. at 104.

In *Gervant v. New England Fire Insurance Co.*, 306 N.Y. 393, 118 N.E. 2d 574 (1954), the Court stated:

> The Appellate Division was also correct in concluding, in view of our decision in *McAnarney v. Neward Fire Ins. Co.*, (247) N.Y. 176 that the "actual cash value" of premises under a standard fire insurance policy in this State cannot be arrived at by receiving evidence of replacement cost less depreciation only. Rather, the trier of fact should listen to all pertinent evidence on the subject. The insurer in that case had agreed to insure to the "extent of actual cash value." We interpreted that phrase to mean actual value ex-

> pressed in terms of money and said (pp. 182-184): "We do not agree *** that, under the standard clause, the sole measure of damage was ***. This provision, while it doubtless comprehends cost of reproduction, does not restrict the field of investigation to such cost or provide that, with depreciation, it shall constitute an exclusive measure of recovery."

306. N.Y. at 398.

More recently, in *Incardona v. Home Indemnity Co.*, 60 App.Div. 2d 749, 400 N.Y.S.2d 944 (4th Dep't 1977), it was held that:

> [W]hile reproduction cost less depreciation is competent evidence of actual cash value in a fire loss, it is error to instruct the jury that reproduction cost less depreciation is the sole measure of actual cash value . . . Replacement cost or cost of repair standing alone is not sufficient proof of actual cash value.

Id. at 749-50.

The net effect of the application of the *McAnarney* rule was summarized by one commentator as follows: " 'Actual cash value' is defined by the New York Court of Appeals as the economic value of the building as distinguished from its replacement value." Note, *Valuation and Measure of Recovery under Fire Insurance Policies*, 49 Colum. L. Rev. 818, 822 (1949).

As these authorities make manifest, "actual cash value" at the time of the loss is an artificial, arbitrary valuation, requiring consideration of any relevant factor and the resolution of the conflicts presented by such factors. Here the facts were established, as set forth above, concerning replacement cost, the J-51 designation and the applicable zoning, the architectural distinctions of the buildings, the market value of the property in June 1978 and June 1979, the ratios of the accepted building and land values, the income received from the property, projected profits, and the market value of comparable property.

Both appraisal experts agreed that the most useful analysis for valuation purposes to be threefold: cost of replacement, income

evaluation and market data (comparable sales). The age of the buildings made the cost of replacement generally an inappropriate measure, and it was agreed that such replacement cost was substantially in excess of the $1.0 million limitation. The operation of the buildings at a loss in 1978 tends to diminish their value, while the anticipated profit on conversion produce the opposite result. Neither factor was relied upon to any considerable extent by any of the valuation experts and both are considered here to be of relatively little assistance in the determination which is required.

The square footage analysis of comparable values calculated by both experts on the basis of comparable sales include both land and building value, while the insurance policy applies only to the premises, the buildings, and therefore, the value of the land must be deducted from the total "actual cash value." The subsequent sale at $2.0 million in light of the sale purchase for $1.3 million the year before demonstrates amply that the land may well have been more valuable without the insured buildings, in this particular area of Manhattan, zoned as it was. In any case, since land is also involved in the comparability figures, further analysis is required.

Most relevant and useful among all the factors considered by the experts were the market value calculations based on comparable transactions, a method relied upon by both experts which included land value. Fine's expert considered the land value in the neighborhood of 33% of the market value and Bellefonte's expert testified 41% to be the appropriate percentage. In addition, because the properties had a grandfathered designation for J-51 treatment providing substantial reduction of taxes upon conversion, their market value was enhanced.

According to Bellefonte's expert who was entirely credible and most knowledgeable,[4] the property was worth $2.5 million using comparable sales to fix value. Fine's expert attributed a market value of $3,680,000 on a comparable value calculation. Bellefonte would seek to limit any recovery to $500,000, taking the market value given by their expert of $2.5 million less the sale price of $2.0 million in June 1979 as the best criterion for

value. However, Bellefonte provides no support for the proposition that the subsequent sales price should be deducted in determining "actual cash value," a defined term in the Policy under which recovery is sought. Finally, at this stage, Bellefonte properly seems to have abandoned its earlier claim that since the policy covered loss and Fine made a profit on the sale in June 1979 over his acquisition cost, no recovery under the Policy was warranted.

I conclude under these circumstances and taking all the facts found above into consideration that the most appropriate measure of "actual cash value" is the market value of the properties on the day of the fire calculated on the basis of comparable values, namely, $2.5 million, reduced by the value of the land calculated at a ratio of 37%, a ratio between those asserted by the two experts, who were not far apart on this issue. Thus the actual cash value of the premises at the time of the fire was $1,575,000 and that Fine therefore is entitled to recover the entire policy of $1.0 million.

Additional Claims

The difficulty of the issues presented to the court and all that has preceded in this opinion demonstrate that Bellefonte's conduct in refusing payment was not vexatious or without reasonable cause. Fine is therefore not entitled to attorneys' fees.

There are other items, the amounts of which are not in contention, to which Fine is entitled: $150,000 for rental on 649 and 653 and 657; damage to 657 in the amount of $214,221; and the expenses for debris removal of $170,466.60.

Submit judgment on notice in accordance with this opinion within ten (10) days.

IT IS SO ORDERED.

DATED: New York, N.Y. /s/ _____
December 29, 1982 ROBERT W. SWEET
U.S.D.J

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1547, 1548—August Term, 1982

(Argued June 7, 1983 Decided January 3, 1984)

Docket No. 83-7188/98

MARTIN FINE, WILLIAM BECKER and PHILIP BECKER, individually, and WILLIAM BECKER and PHILIP BECKER d/b/a BECKER & BECKER, all doing business as 649 BROADWAY EQUITIES CO.,

Plaintiffs-Appellees-Cross-Appellants,

—v.—

BELLEFONTE UNDERWRITERS INSURANCE CO.,

Defendant-Appellant-Cross-Appellee.

Before:

OAKES and MESKILL, *Circuit Judges*,
and HILL,* *District Judge*.

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* Honorable Irving Hill, Senior United States District Judge for the Central District of California, sitting by designation.

Appeal from a judgment of the U.S. District Court for the Southern District of New York, Robert W. Sweet, *J.*, granting recovery to the insured on a fire insurance policy despite a finding that the insured had testified falsely under oath in a post-fire examination because the false statements were not deemed to be "material".

Reversed.

HERBERT P. POLK, N.Y., N.Y. (Robert S. Newman, of Whitman & Ransom, N.Y., N.Y., of counsel) *for Appellant*.

ANDREW C. JACOBSON, N.Y., N.Y. (Frank A. Weg, Dennis T. D'Antonio, of Weg Meyers & Jacobson, N.Y., N.Y., of counsel) *for Appellee*.

HILL, *District Judge*:

In June 1978, Plaintiff, Fine,[1] purchased three contiguous parcels of land in New York City for a total price of $1,300,000. Each parcel had a building on it. Though the buildings had separate addresses (649, 653 and 657 Broadway), they were also contiguous and were operated as a single economic unit. The three buildings had a single heating system which employed a single boiler.

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1 The Plaintiffs in this action are Martin Fine, William Becker and Philip Becker, and William Becker and Philip Becker d/b/a as Becker and Becker. Plaintiffs collectively did business as 649 Broadway Equities Co. Plaintiffs collectively are herein referred to for convenience as "Fine".

Following the purchase, Fine, through a broker, obtained a policy of fire insurance covering the three buildings (and other properties) from defendant Bellefonte Underwriters Insurance Co. (hereinafter "Bellefonte"). The policy was in the standard New York form.

At the time of Fine's purchase, the buildings were occupied by commercial tenants, some artists, and others who conducted light manufacturing and warehousing businesses. Fine desired to convert the buildings to residential use. Toward that end, after buying the buildings, he did not renew most expiring leases and he engaged in a "freeze-out" policy designed to minimize expenses and discourage tenants from remaining. The heat timer which controlled operation of the boiler, based in part on outside temperature, was set so that it would not start up the heating system until a sub-freezing temperature was reached. Additionally, the superintendent was told to turn off the heating system entirely from 11 a.m. to 2 p.m. each day regardless of the outside temperature. By February 1979, when the fire occurred, only about one-third of the premises remained occupied.

On February 14, 1979, a fire of unknown origin occurred which started in the 649 and 653 Broadway buildings and spread to 657 Broadway. The buildings at 649 and 653 Broadway were totally destroyed except for their facades and the building at 657 Broadway was substantially damaged.

On the night of the fire the sprinkler system in the buildings, which was the main fire protection device, did not operate. The sprinkler system was of the so-called wet pipe constant pressure type. In this type of system, pipes within the building are filled with water which is under pressure from gravity tanks. In addition, there are fittings outside the buildings at street level to enable the Fire

Department to pump water form city mains into the system. The trial judge found that on the night of the fire, none of the sprinkler heads in the system worked. The Fire Department was unable to pump water into the system due to blockage in the pipes which the trial court found was "presumably" caused by ice. The trial court found that had the sprinklers functioned normally, the fire could have been controlled.

Fine submitted claims on the policy which Bellefonte, after investigation, denied. Bellefonte based its denial of liability on the assertion that three separate provisions of the policy had been breached, claiming that a breach of any one of the three would relieve it of liability. The three provisions were:

1. The so-called "Protective Maintenance Clause",[2] which is a warranty that "protective systems and warning devices" will be maintained in complete working order and will not be altered.

2. The so-called "Increased Hazard Clause",[3] which voids coverage if "the hazard is increased by any means within the knowledge of the insured."

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2 The language of this policy provision is as follows:

Protective Maintenance. It is warranted that the insured shall maintain in complete working order such protective systems and warning devices as existed at time of attachment of this policy, or which the insured has agreed to install, insofar as it is under the insured's control or supervision, and that no change shall be made in the said protective systems and warning devices without the consent in writing of this company. (App. p. A-260)

3 The language of this policy provision is as follows:

Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring (a) while the hazard is increased by any means within the control or knowledge of the insured . . . . (App. p. A-262)

3. The so-called "False Swearing Clause",[4] which provides that coverage is voided if, before or after a loss, the insured has willfully concealed or misrepresented any material fact concerning the insurance or the insured property, or in the event of any "fraud or false swearing by the insured" relating to any such material fact.

Fine filed the instant action against the insurer for payment of the loss. After a lengthy court trial, the trial court found in favor of Fine and against the insurance company and awarded a judgment of $1,214,221 for damage to the buildings[5] plus additional sums of $150,000 for loss of rental and $170,446.60 for debris removal. Bellefonte appeals, asserting that the trial court's failure to sustain each of its three separate defenses involved an error of law and was against the weight of the evidence. If, arguendo, Bellefonte is found liable, it also asserts that the trial court erred by adopting the wrong measure of damages. Fine cross-appeals from the trial court's refusal to award interest from the date of the fire to sixty days after the date when proof of loss was submitted.

We reverse on the ground that Fine violated the false swearing provision of the policy, thus voiding the coverage and the trial court's conclusion to the contrary cannot stand. It is therefore unnecessary for us to reach

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4 The language of this policy provision is as follows:

Concealment, fraud. This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto. (App. p. A-262)

5 Four months after the fire the three properties were sold in their fire-damaged condition for $2 million with the sellers apparently retaining all rights to recovery under the policy.

the other issues raised in connection with the appeal or the cross-appeal.

THE FALSE SWEARING ISSUE

The fire occurred during an extended period of extremely cold weather. Outside temperatures averaged 10° Fahrenheit on the day of the fire. Bellefonte quickly learned, as reported by the Fire Department, that the sprinkler system in the buildings had failed to operate during the fire. The rapid spread of the fire and much of the loss was attributed to the non-operation of the sprinklers.

Bellefonte also became aware, early on, of Fine's decision to rid the buildings of the existing commercial tenants and of the tenants' complaints that he had instituted a freeze-out policy. Bellefonte was naturally very interested, not only in what caused the fire, but also whether a freeze-out policy was in effect and, if so, whether Fine's actions in pursuit of the freeze-out might have contributed to the failure of the sprinkler system. An obvious theory suggested itself, i.e., that there had been extremely low temperatures in the buildings before the fire which caused the pipes in the sprinkler system to freeze and that this was the result of conduct by the insured. The facts of which Bellefonte became quickly aware suggested the possibility that further investigation might establish a material breach of the protective maintenance clause or the increased hazard clause, or both.

With this in mind, Bellefonte conducted extensive examinations under oath of Mr. Martin Fine (the one owner, among the group of owners, in charge of operating the buildings), and of Mr. George Peters, managing agent for the owners. The examination of both dealt to a

large extent with the instructions given and the provisions made for inspection and maintenance of the boiler heater and the sprinkler system, and particularly with the temperature setting employed on the heat timer that controlled the operation of the boiler.

The district court found that Fine and Peters each answered falsely during examination under oath. Both Fine and Peters stated in the examinations that they had charged the superintendent, a Mr. Aloisio, with the responsibility for inspecting and maintaining the sprinkler systems as he had been charged under the prior ownership. The trial court found such testimony to be false and that Aloisio had not been so charged or instructed.

During his examination, Mr. Fine testified that the nighttime setting for the heat timer controlling the boiler was 40 degrees and Mr. Peters testified that he had instructed superintendent Aloisio to set the heat timer at 40 degrees for nighttime operation. The trial court found that the testimony of both men was false in this respect. The court found that Aloisio had been instructed by Peters personally to set the heat timer at 25 degrees for nighttime and that Aloisio had, despite such instruction, set it for 30 degrees.

Despite the aforesaid findings of falsity, the trial court rendered judgment for Plaintiffs on the false swearing defense on the ground that the false statements were not material.

Under the heading, "Conclusions of Law", the trial court said:

> "Here the statements were not material to the investigation. Given the extreme temperatures during the period from February 5th to February 14 as noted above, whether the heat timer setting was 25

degrees, 30 degrees or 40 degrees would not have affected the operation of the heating system. Further there was no testimony that a 25 degree or 30 degree setting would have constituted a practice which would have reasonably been foreseen to result in a freezing condition, which, in turn would have made the sprinkler system inoperative."

"Similarly with respect to the sprinkler maintenance issue, whether Aloisio was instructed to perform maintenance on the sprinkler system or not, in fact he did take the action necessary to repair the system, and there is no indication in this record that any failure of record keeping or regular maintenance was in any way responsible for the freeze-up. Since the Fine policy of freeze-out has not been proved to be the cause of the freeze-up, the false statements, viewing them as such, were not material as contemplated under section 168 [of New York Insurance Law]."

(App. p. A-388-89).[6]

The standard or test by which to measure the materiality of a statement is sometimes regarded as a pure question of law and sometimes regarded as a mixed question of law and fact. In this case, where the statements were admittedly made and the finding of their

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6 Section 168(6) of the New York Insurance Law prescribes the exact language to be used in a standard fire insurance policy in New York state, including the exact language of the section on false swearing. The statutory language was followed in the instant policy. Insurance statutes in all or nearly all of the states prescribe a standard fire insurance policy including the exact language to be employed therein. R. Keeton, *Basic Text on Insurance Law* 70 (1971). Of those who do, almost all use the New York form, including its exact "False Swearing Clause". INS. L. REP. Fire & Casualty Cas. (CCH) pp. 2002 (Dec. 6, 1972), 2003-04 (Nov. 1982), 2007-10 (Apr. 1982).

falsity is not attacked on appeal, the question seems to be purely one of law which we may consider on appeal without reference to the "clearly erroneous" requirements of Fed. R. Civ. P. 52(a).[7] We conclude that the standard or test of materiality adopted by the trial judge in the above quoted language was erroneous.

The trial judge regarded the materiality of the false statements as being dependent upon the ultimate determination of the facts concerning the fire as they were finally revealed to the court after a trial lasting many weeks. As the trial judge analyzed it, if it turned out, after a trial, that the sprinkler system would have been inoperative anyway on the night of the fire for reasons unrelated to the subject of the false statements, false statements about the setting of the heat timer and about maintenance and inspection of the sprinkler system made during the company's earlier investigation became immaterial. To make such statements material, the trial judge appears to reason, the insurer would have had to prove at the trial that the setting of the heat timer or a failure of maintenance of the sprinkler system caused the pipes to freeze and the sprinklers to be inoperative on the night of the fire.

In our view, the trial judge's definition of materiality was far too restrictive and not in accordance with long-established case law.

The issue is: Is a false statement material only if it relates to a matter or subject which ultimately proves to be decisive or significant in the ultimate disposition of the

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7 But even if the question as posed in this case is regarded as a mixed question of law and fact, Fed. R. Civ. P. 52(a) would not preclude this Court from its own independent consideration. *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *Karavos Compania Naviera, S.A. v. Atlantica Export Corp.*, 588 F.2d 1 (2nd Cir. 1978); *First National Bank of Cincinnati v. Pepper*, 547 F.2d 708 (2nd Cir. 1976).

claim, or is it sufficient that the false statement concerns a subject reasonably relevant to the insurance company's investigation at the time? The law is clear that the materiality of false statements during an insurance company investigation is not to be judged by what the facts later turn out to have been. The purpose of a provision requiring an insured to submit to an examination under oath is to enable the insurance company to acquire knowledge or information that may aid it in its further investigation or that may otherwise be significant to the company in determining its liability under the policy and the position it should take with respect to a claim. Thus the materiality requirement is satisfied if the false statement concerns a subject relevant and germane to the insurer's investigation as it was then proceeding.

One hundred years ago, in the seminal case of *Claflin v. Commonwealth Insurance Co.*, 110 U.S. 81 (1884), the Supreme Court stated:

> The object of the provisions in the policies of insurance, requiring the assured to submit himself to an examination under oath, to be reduced to writing, was to enable the company to possess itself of *all knowledge, and all information as to other sources and means of knowledge*, in regard to the facts, material to their rights, *to enable them to decide upon their obligations, and to protect them against false claims*. And every interrogatory that was relevant and pertinent in such an examination was material, in the sense that a true answer to it was of the substance of the obligation of the assured. A false answer as to any matter of fact material to the inquiry, knowingly and willfully made, with intent to deceive the insurer, would be fraudulent. If it accom-

> plished its result, it would be a fraud effected; if it failed, it would be a fraud attempted. . . . No one can be permitted to say, in respect to his own statements upon a material matter, that he did not expect to be believed; . . . *their materiality, in the eye of the law, consists in their tendency to influence the conduct of the party who has an interest in them and to whom they are addressed.*

110 U.S. at 94-95 (emphasis supplied).

> As the Tenth Circuit said in a recent case: Regarding allegations of false swearing,, a misrepresentation will be considered material if a reasonable insurance company, in determining its course of action, would attach importance to the fact misrepresented.

Long v. Insurance Co. of North America, 670 F.2d 930, 934 (10th Cir. 1982).

In *Chaachou v. American Central Insurance Co.*, 241 F.2d 889 (5th Cir. 1957), the Fifth Circuit, in dealing with a fire policy in the standard New York policy form, confronted a materiality question much like the issue before us. That court marshalled the authorities and two authorities quoted with approval in *Chaachou*[8] are particularly relevant.

> If the plaintiffs knowingly and wilfully, with intent to defraud the defendants, swore falsely in making the proofs of loss, such act amounted to a fraud upon the defendants which avoided the policies, irrespective of the ultimate effect upon the defendants.

Meyer v. Home Insurance Co.,, 127 Wis. 293, 299-300, 106 N.W. 1087, 1089 (1906).

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8 241 F.2d at 894 n.6.

> The fatal effect, however, of a willful misstatement of fact is not disturbed because of the failure of the company to prove that prejudice was thereby occasioned. . . .

3 W. Freedman, *Richards on Insurance* § 510, at p. 1654 (5th ed. 1952).

It thus appears that materiality of false statements is not determined by whether or not the false answers deal with a subject later determined to be unimportant because the fire and loss were caused by factors other than those with which the statements dealt. False sworn answers are material if they might have affected the attitude and action of the insurer. They are equally material if they may be said to have been calculated either to discourage, mislead or deflect the company's investigation in any area that might seem to the company, at that time, a relevant or productive area to investigate.

Therefore, when measured by the proper standard and definition, each of the instant false statements was clearly material. As noted above, Bellefonte was investigating a plausible theory reasonably derived from the available facts, one which would result in the voiding of its coverage. The questions were material to that investigation. It is irrelevant whether Bellefonte was ultimately able to muster sufficient evidence to prove its theory at trial.

Bellefonte was entitled to prevail on its defense that false swearing by the insured voided the policy. The judgment of the district court is therefore REVERSED. The case is remanded to the district court with instructions to enter judgment for the defendant.

APPENDIX C

Opinion of United States District Court
Southern District of New York
dated June 15, 1984

United States District Court
Southern District of New York

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MARTIN FINE, WILLIAM BECKER and PHILIP BECKER, individually, and WILLIAM BECKER and PHILIP BECKER d/b/a BECKER & BECKER, all doing business as 649 Broadway Equities Co.,

Plaintiffs,

—against— 80 Civ. 3747 (RWS)
OPINION

BELLEFONTE UNDERWRITERS INSURANCE CO., CITIBANK, N.A., and JOHANA ZUCKERMAN,

Defendants.

----------x

APPEARANCES:

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Of Counsel

SWEET, D.J.

The January 3, 1984 opinion of the Court of Appeals reversed this court's judgment and remanded the case "with instructions to enter judgment for the defendant." The mandate was filed in the district court on May 7, 1984.

Plaintiffs have moved under Rule 59 and Rule 60(b)(1) and (6), Fed.R.Civ.P., to set aside the judgment and for a new trial, contending that this court should hold a new trial on the issue of the insured's wilfulness in making the false statements.

The New York law on the materiality of false swearing as declared by our Court of Appeals without reference to any current state authority is as follows:

> False sworn answers are material if they might have affected the attitude and action of the insurer. They are equally material if they may be said to have been calculated either to discourage, mislead or defeat the company's investigation in any area that might seem to the company, at that time, a relevant or productive area to investigate.

Fine v. Bellefonte, Nos. 83-7188, 83-7198, slip op. at 7486 (2d Cir. Jan. 3, 1984).

Plaintiffs have alleged that if the court had found the false swearing to have been "knowingly and wilfully made, with intent to deceive the insurer," such finding would have constituted a "manifest mistake of fact." There was no such finding, only a finding that the testimony given was false.

While it might be argued that a further hearing is required to determine the insurer's subjective reaction to the false testimony, even the plaintiffs wisely have not urged that such an empty exercise be undertaken. Obviously by merely posing the questions, falsely answered, the insurer determined the "area [to be one] that might seem to the company, at that time, a relevant or productive area to investigate." *Fine*, slip op. at 7486.

As this court understands the Court of Appeals' decision, any false swearing in an examination by an insurer in a "relevant or productive area" voids the policy. No further facts need be adduced to meet this standard.

Moreover, plaintiffs' request that this court grant a new trial on the wilfulness issue is not properly before this court. Plaintiffs have twice made exactly this request to the Court of Appeals, first in a petition for rehearing and then in a petition for rehearing *en banc*. Both petitions were denied. Thus, even after having twice heard plaintiffs' arguments concerning the wilfullness issue, the Court let stand its original decision, which stated:

> Bellefonte was entitled to prevail on its defense that false swearing by the insured voided the policy. The judgment of the district court is therefore REVERSED. The case is remanded to the district court with instructions to enter judgment for the defendant.

Slip op. at 7486.

"The court of appeals' rulings are the law of the case, and the district court is bound to follow them; it has no jurisdiction

to review or alter them." *Eutectic Corp. v. Metco, Inc.*, 597 F.2d 32, 34 (2d Cir. 1979). The Court of Appeals has ruled, and plaintiffs have cited no material change of circumstances or newly discovered evidence so as to bring the case under the principle of *Standard Oil Co. v. United States*, 429 U.S. 17, 18 (1976).

For these reasons, the motion for a new trial is denied. The clerk is directed to enter judgment dismissing the complaint.

IT IS SO ORDERED.

DATED: New York, N.Y.
June 15, 1984

ROBERT W. SWEET
U.S.D.J.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 595 — August Term, 1984

(Argued: January 14, 1985 Decided: March 20, 1985)

Docket No. 84-7600

MARTIN FINE, WILLIAM BECKER and PHILIP BECKER, Individually, and WILLIAM BECKER and PHILIP BECKER d/b/a BECKER & BECKER, all doing business as 649 BROADWAY EQUITIES CO.,

Plaintiffs-Appellants,

—against—

BELLEFONTE UNDERWRITERS INSURANCE CO., CITIBANK, N.A., and JOHANA ZUCKERMAN,

Defendants-Appellees.

Before:

OAKES, CARDAMONE and PIERCE,
Circuit Judges

Appeal from a denial of Fed. R. Civ. P. 60(b) relief in the United States District Court for the Southern District of New York (Sweet, J.). The district court considered itself bound by the law of the case doctrine because a previous panel of this Court had handed down a decision in this case.

Affirmed.

WHITNEY NORTH SEYMOUR, JR., New York, New York (Claude P. Bordwine, Brown & Seymour, New York, New York, Weg & Myers, P.C., New York, New York, of counsel), *for Plaintiffs-Appellants.*

HERBERT P. POLK, New York, New York (Robert S. Newman, Whitman & Ransom, New York, New York, of counsel), *for Defendant-Appellee.*

CARDAMONE, *Circuit Judge:*

On this appeal we must weigh the policy that seeks the final repose of litigation against a claim that this Court incorrectly decided a particular case. Appellants urge that this panel review and reverse what they claim is an incorrect determination of a previous panel. It is not inconceivable that on occasion a judgment of this Court may be in error. No proof is required to demonstrate the fallibility of this or any Court. Nonetheless, the rules of appellate procedure are specifically designed to catch those instances when a panel misapprehends or overlooks some point of law or fact. The rules are meant to assure a party on appeal that its argument has been comprehended and considered by the Court. If we ignore these established procedures in an attempt to remedy a perceived error, we will throw a wrench into the collegial workings of our Court that are essential to its institutional integrity.

I

After fire destroyed several New York City buildings owned by plaintiffs-appellants Martin Fine, William Becker and Philip Becker, d/b/a 649 Broadway Equities

Co., they made claim under their fire insurance policies written by defendant-appellee, Bellafonte Underwriters Insurance Co. At a deposition conducted in connection with the claim some of the questions asked of appellants concerned the sprinkler system, which had failed to function and hence did not check the spread of the fire. Appellants' answers to the question were false. In particular, appellants were queried about the instructions given regarding thermostat settings for the furnace and inspection and maintenance of the system. Martin Fine, one of the owners, and George Peters, an agent for the owners, both testified that the nighttime thermostat setting for the furnace had been 40 degrees. After its investigation the fire insurance underwriter concluded that the owners had instructed the building superintendent to reduce the thermostat's nighttime setting so that the furnace would not turn on until the outside temperature was below 25 degrees. Appellee therefore concluded that appellants had falsely answered a material question and refused to pay the fire claim.

Appellants then instituted this diversity action in the United States District Court for the Southern District of New York (Sweet, J.). Although the trial court characterized appellants' statements as "mistaken" or "inaccurate and consequently false," it nonetheless found that the statements were not material because the lower thermostat setting was not responsible for the fire loss incurred during the near-zero temperatures existing at the time of this February 1980 blaze. Defendant Bellefonte appealed.

On appeal, a panel of this Court reversed as a plain error of law the finding by the district court that the false answers were not material. This Court set aside the verdict and voided appellants' insurance policy under

the "concealment, fraud" provisions of section 168 of the New York Insurance Law. N.Y. Ins. Law § 168 (McKinney Supp. 1984); *Fine* v. *Bellefonte Underwriters Insurance Co.*, 725 F.2d 179 (2d Cir.), *cert. denied*, 105 S. Ct. 233 (1984). In its opinion, the panel stated that "[f]alse sworn answers are material . . . if they may be said to have been calculated either to discourage, mislead or deflect the company's investigation in any area that might seem to the company, at that time, a relevant or productive area to investigate." 725 F.2d at 184. The opinion did not purport to determine whether the false statements in the instant case were willfully made. Nor did it intimate that willfulness was not required.

Appellants thereafter filed petitions under Fed. R. App. P. 40 for rehearing, and under Fed. R. App. P. 35(b) for rehearing in banc. They argued in the petition that there had been no finding of willfullness. Both petitions were denied. Appellants then petitioned the Supreme Court for certiorari, which was also denied. 105 S. Ct. 233. Later, appellants moved before Judge Sweet for an order pursuant to Fed. R. Civ. P. 59 and 60(b)(1) and (6), to set aside the judgment and grant a new trial on the issue of willfulness. The district court denied appellants' motion on the grounds that the decision by this Court was the law of the case. From the district court's denial of Rule 60(b) relief, appellants brought the instant appeal. At the same time they moved for leave to file a second petition for rehearing and to consolidate that petition with this appeal. This motion was denied. Appellants question on this appeal the district court's application of the "law of the case" doctrine. They also ask us to consider whether and under what circumstances a panel of the Court may recall its mandate. We turn to these issues.

II

In July 1984, some months after the previous panel's decision the New York Court of Appeals reaffirmed, in *Deitsch Textiles, Inc.* v. *New York Property Insurance Underwriting Ass'n*, 62 N.Y.2d 999 (1984), that in addition to materiality, an insurance company must prove willfulness to void a fire insurance policy. Appellee attempts to distinguish *Deitsch Textiles* on the ground that it involved false statements made in a proof of loss statement and not a false swearing on an examination under oath. The distinction is not supported by precedent. False swearing is "swearing knowingly and intentionally false and not through mere mistake." *Black's Law Dictionary* 725 (rev. 5th ed. 1979). There is no distinction between false statements made in proof of loss statements and false statements made under oath. *See Sunbright Fashions, Inc.* v. *Greater New York Mutual Insurance Co.*, 34 A.D.2d 235, 236 (2d Dep't 1970), *aff'd*, 28 N.Y.2d 563 (1971). In *Sunbright Fashions* the Appellate Division reversed a denial of summary judgment upon determining that the facts supported only an inference of deliberate false testimony. In that case, the claimant admitted that he had lied under oath and had prepared false documents to support his false claim. 34 A.D.2d at 237. We accept the fact, therefore, that according to the law of New York, a false statement made on an examination under oath must be both material and willful in order to void a fire insurance policy.

III

Appellants contend that the district court erred as a matter of law in refusing to consider its motion under Rule 60(b). We disagree. Our previous ruling was the

law of the case, and the district judge correctly found that it had no jurisdiction to review an appellate court's decision. *Eutectic Corp.* v. *Metco Inc.*, 597 F.2d 32, 34 (2d Cir. 1979); *United States* v. *Fernandez*, 506 F.2d 1200, 1202 (2d Cir. 1974). *See also Seese* v. *Volkswagenwerk A.G.*, 679 F.2d 336, 337 n.1 (3d Cir. 1982) ("the basis of the Rule 60(b)(6) motion was before this court and the Supreme Court, and thus could not be considered by the district court"). Judge Sweet correctly noted that the appellants cite no material change of circumstances or newly discovered evidence so as to bring the matter under the aegis of *Standard Oil Co.* v. *United States*, 429 U.S. 17, 18 (1976).

IV

Appellants also urge that this Court correct its own mistake by recalling its mandate. They vigorously contend that our previous decision, which focused solely on the legal standard to be used in determining materiality, incorrectly assumed the element of willfulness. They argue, therefore, that the required finding that their false answers were willfully made is missing. They cite the district judge who, in ruling on the request for 60(b) relief, stated that it had never made a finding of intent to deceive. Judge Sweet explained that in finding the false statements not to be material in his earlier opinion, he had never had occasion to consider the question of willfulness.

This argument is only properly made to and determined by the panel that originally heard the appeal. Appellants were denied both their application for leave to file a second petition for rehearing and the motion to consolidate the previous appeal with the denial of their Rule 60(b) motion. We cannot review the correctness of

a previous panel's decision. *See In re Jaylaw Drug, Inc.*, 621 F.2d 524, 527 (2d Cir. 1980); *United States* v. *Baily*, 468 F.2d 652, 669 (5th Cir. 1972).

Although it has been discussed previously, we set forth here the chronology of this case, because it is relevant to our conclusion. The records reveal the following:

January	3, 1984	— panel decision handed down that *reversed* the district court judgment
January	30	— appellants' motion to have entire transcript of the examination of Fine and Peters filed with the Court *granted*
February	22	— petition for rehearing before original panel *denied*
April	24	— petition for rehearing in banc on the basis that the district court had not found that false testimony was willfully made *denied.*
May	1	— mandate of this Court issued
June	15	— motion in district court before Judge Sweet for Fed. R. Civ. P. 60(b) relief *denied*
September	12	— notice of appeal from denial of 60(b) relief filed
October	1	— petition to the Supreme Court for certiorari *denied*

October 18 — application to original panel for leave to file a *second* petition for rehearing, recall of the May 1 mandate and consolidation of the previous appeal with an appeal from denial of 60(b) relief *denied*

January 14, 1985 — oral argument before the present panel (only Judge Oakes was on the previous panel) seeking reversal of denial of 60(b) relief.

The Federal Rules of Appellate Procedure and Rules of the Second Circuit provide the frame for an analysis of the recited chronology. Under Fed. R. App. P. 40(a) a party may file a petition for rehearing within 14 days after entry of judgment. The petition is referred to the judges who heard the appeal and may call their attention to the points of law or fact that in petitioner's opinion the court has misapprehended or overlooked. *See* 2d Cir. R. 27(c). The mandate of the Court issues 21 days after the entry of judgment, except that timely filing of a petition for rehearing stays it until the disposition of the petition. If the rehearing petition is denied, the mandate issues seven days after the order of denial. Fed. R. App. P. 41(a). A motion to recall or modify the mandate may be made at any time and is referred to the judges who heard the appeal. 2d Cir. R. 27(c). A suggestion for rehearing in banc must be made within 14 days after entry of judgment and does not stay the issuance of the mandate. Fed. R. App. P. 35(c).

The argument now before us was before the original panel, that panel must be presumed to have considered it

on a motion for rehearing. *See NLRB* v. *Brown & Root, Inc.*, 206 F.2d 73, 74 (8th Cir. 1953). In the interest of finality of litigation, a panel will ordinarily recall its mandate only in exceptional circumstances. *See Greater Boston Television Corporation* v. *F.C.C.*, 463 F.2d 268, 278 (D.C. Cir. 1971); *Ligate* v. *Maloney*, 348 F.2d 164, 166 (1st Cir. 1965); *Hines* v. *Royal Indemnity Co.*, 253 F.2d 111, 114 (6th Cir. 1958); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3938 (1977). Perhaps the first panel believed—as the Supreme Court did on this subject in an early case—that if a person makes a statement knowing it to be false the law will infer an intent to deceive. *See Claflin* v. *Commonwealth Insurance Co.*, 110 U.S. 81, 95 (1884). It may be that the original panel concluded that the record could not support a finding that appellants' answers to the questions regarding the setting of the thermostat were merely mistaken or inadvertent. Whether we would make the same determination is irrelevant, we may not now question the first panel's reasoning.

Whatever error is perceived to exist in the original panel's refusal to recall its mandate pales beside the far greater error that we would commit were we to recall its mandate. Absent a change in circumstance or law, one panel of an appellate court cannot review the decision of a previous panel. It would increase the work of each judge immeasurably if past decisions could be reopened by subsequent panels. *See* B. Cardozo, *The Nature of the Judicial Process* 149-50 (1945). Again, appellants have argued the willfulness issue five times—in their motion for rehearing denied in February 1984, the suggested rehearing in banc denied in April, the petition for certiorari to the Supreme Court and the second application for rehearing before the original panel, both denied in

October, and the January 1985 argument before this panel. They have more than had their day in court. That appellants remain dissatisfied with the result is no reason to change the process of review fully afforded them. All disputes, including this litigation, must finally end.

The judgment is affirmed.

APPENDIX E

Summary of Essential Facts*

The following is a statement of the essential facts governing this appeal:

On January 3, 1984, a panel of this Court reversed a judgment in favor of plaintiffs for more than $1.5 million rendered after a bench trial, and directed entry of a judgment dismissing the complaint. The basis for the reversal was that plaintiffs had been guilty of *wilful false swearing with intent to deceive* which was *material* and thereby triggered the New York statutory fraud and concealment cause voiding the insurable policy in suit.

The panel's opinion discussed at some length the standard of *materiality,* but never once addressed the essential element of *wilfulness* expressly identified as an element in the two cases on which it primarily relied. It simply *assumed* that the element of wilfulness was present.

That assumption was wrong. When plaintiffs applied to the District Court for a new trial on the ground that there had been a manifest mistake of fact, the trial judge expressly stated that there had *never* been a finding of wilfulness or intent to deceive:

> Plaintiffs have alleged that if the court had found the false swearing to have been "knowingly and wilfully made, with intent to deceive the insurer," such finding would have constituted a "manifest mistake of fact." There was no such finding, only a finding that the testimony given was false. (A-127)

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* Reprinted from Brief of Appellants in U.S. Court of Appeals.

"All Risks" Policy

This case involves an "all risks" insurance policy sold by an out-of-state insurance company to property owners in New York State. The purpose of such a policy is to guarantee coverage for any and all property damage or loss however caused. The insured simply notifies the company that a loss has occurred and requests reimbursement. It does not have to prove the nature or cause of the loss. If the insurance company refuses to make payment it assumes the burden of proof to justify its refusal.

The Interrogation

Insurance policies give the insurer a contractual right to interrogate the insured and its employees concerning loss claims. This is a broad contractual right, unrestricted by the State's Civil Practice Law and Rules or the Federal Rule of Civil Procedure. Refusal to answer on any ground constitutes a breach of contract and may forfeit coverage.

The False Swearing

The questions and answers which are the basis for the insurance company's refusal to pay on its policy in this case related to the operation of the sprinkler system, which failed to control the fire. They did not relate directly to the cause of the fire or to any established proof as to the reason for this failure. The original panel nonetheless ruled that they were "material" to the insurance company's investigation.

The Missing Element

What the insurance company failed to establish was that the false answers were "wilful" and made with "intent to defraud." The District Court made no such finding; the original panel made no such finding; the District Court has re-iterated that there was no such finding.

This is the critical turning point of this appeal: *the absence of any proof or finding of wilfulness.*

The Draconian Nature of the Decision

The effect of the original panel's decision was to declare the forfeiture of a $1.5 million award on a paid-up insurance policy on a total property loss.

This $1.5 million forfeiture was *not* based on any fraud on the owner's part.

The forfeiture was *not* based on any finding of the owners' responsibility for causing the fire.

The forfeiture was *not* based on any finding of the owners' responsibility for causing the misfunction of the sprinkler system.

It was based *solely* upon a finding that one set of answers given during the insurance company's interrogation was "false" and another was "inaccurate and therefore false."

There was no finding that these answers actually impeded the insurance company's investigation, or that they were even intended to impede that investigation.

There was no finding that these answers were anything other than inaccurate recollections. Although they were found to be wrong, they were not found to be *intentionally* wrong.

More significantly, as a matter of law, they were not found to be based on any plan or intent to defraud the insurance company. The company did not even attempt to establish such a claim.

This appeal presents a situation of a $1.5 million dollar forfeiture imposed solely because of two factually incorrect answers which had nothing to do with the issuance of the insurance policy, the cause of the loss, or the validity of the loss claims.

Detailed Statement of Facts

Appellants are real estate investors and developers with extensive experience in Manhattan properties (Pltf's Ex. 5, Tr. 83, 2A-241).

In 1977, the partnership contracted to purchase three buildings, 649, 653 and 657 Broadway in New York City. The buildings were contiguous five and six-story buildings with a stylistically unified marble and cast iron facade. They were located on the west side of Broadway in an area of lower Manhattan known colloquially as "NO-HO" (north of Houston Street). They were uniformly two hundred feet deep and comprised approximately 158,000 square feet of space above grade level (plus basements and sub-basements), divided into approximately seventeen lofts. The three buildings were operated as a single unit and heated by a new boiler located in the basement of the middle building (No. 653) (Pltf's Ex. 36C, Tr. 91, 92). Title passed to plaintiffs in June, 1978. The buildings were occupied by tenants engaged in light manufacturing, warehousing, and a few instances by artists in residence. (A-3).*

The buildings originally were operated as the main store of the W & J Sloane Department Stores, and contained many beautiful architectural details, including high ceilings, large windows, arches, facades, and a Victorian interior with wood and plaster decorations. (A-3).

Prior to purchase, appellants had retained an architect who had participated in many successful conversions of properties of this type, who advised petitioners on the feasibility of converting the buildings to cooperative, condominium or rental apartments. Plans were drawn and filings made with the appropriate government agencies. The conversion was permissible without the need of a zoning variance. Tax policy encouraged such a program by providing tax benefits as of right if a conversion to residential use was undertaken. (A-4). The projected net profit upon successful completion of the conversion program was $4.5 million (A-15).

* The "A-" references in this section are to the Joint Appendix in Docket No. 83-7188/98.

Appellants proceeded to arrange for insurance to cover 31 properties owned by them, including the subject buildings. On November 7, 1978, a policy was issued by Respondent Bellefonte, with an inception date of October 11, 1978. The policy issued was an "All Risks" policy insuring 31 properties owned by plaintiffs for a total value of $19,000,000. The properties in question are listed as locations 24, 25 and 26, with various amounts of insurance totalling $1,700,000 (less than 10 percent of the total policy coverage) on the three buildings, plus coverage in the aggregate amount of $150,000 for loss of rents, plus coverage for debris removal. The policy separately provided a $2,000,000 limit of liability for any one loss (Pltf's Ex. 5). The amount of insurance carried for the subject buildings is the same amount as the prior owner carried. The insurance company never undertook any inspection of the buildings, notwithstanding its absolute right to do so. (Tr. 1175-1177).

The buildings were equipped with a wet pipe sprinkler system. Appellants continued existing contracts with Honeywell Protective Systems, Inc. and AFSA Protective Systems, Inc., two companies which monitored the sprinkler system alarms and various devices attached thereto. One of the devices was the water flow alarm, which was operated by a flow of water through the sprinkler system, which transmitted an alarm to a central station, which in turn transmitted an alarm to the Fire Department. Another device was a temperature monitor designed to transmit an alarm if the water temperature in the sprinkler roof tank (on number 657 Broadway) fell below freezing. (A-7, 8).

On February 14, 1979, a fire of major severity occurred. A water flow alarm was received by the Central Alarm Station shortly before midnight and the Fire Department was dispatched. The fire advanced quickly and various high level Fire Department personnel concluded the fire to have been incendiary in origin (A-12-13).

The fire originated within the locked premises of the third-floor tenant (Lion Leather) of the 653 building. The owner had no access to these premises. (Tr. 2693, 2A-167a). Lion Leather's

lease was expiring in two weeks (Tr. 2553); and they had not yet found a new location. The tenant collected $500,000 from their insurance carrier for the loss to the contents of their premises (Tr. 2581).

This tenant had access to the sprinkler control valves on the third floor and the main valves in the basement (Tr. 2508).

The fire resulted in the total destruction of two of the buildings (649 and 653 Broadway); the third building (657 Broadway) was damaged in the stipulated amount of $214,221.

The Sprinkler System

Apart from the cause of the fire – apparently tenant arson* – the most significant factual question at the trial related to the functioning of the sprinkler system which affected the spread of the flames. Witnesses testified that the sprinklers were not observed to operate in two of the three buildings, and expressed the opinion that this failure contributed to the extent of the fire loss. At the trial, the insurance company tried to establish—without success—that the sprinkler system had not been properly maintained by the owners and that improper heating practices had caused the system to freeze up (A-13-14, 21-22).

The company also argued that inaccurate or "false" testimony (found by the District Court) concerning thermostat settings for the furnace and instructions concerning the inspection and maintenance of the system constituted "false swearing" within the meaning of the Section 168 standard statutory fraud and concealment clause in the policy, thereby voiding it. This latter question is the issue presented on this appeal. It was decided adversely to respondents in the District Court; and adversely to petitioners in the Court of Appeals.

The key facts as found by the District Court are summarized below:

1. The sprinkler system was in operation on February 11 (three days before the major fire) at the time a minor fire occurred in a discotheque located in the basement of one of the subject buildings (A-10,22).

* Appellants have brought suit for arson in the State Supreme Court against the commercial tenant in whose premises the fire started.

2. The building superintendent testified that the sprinkler system was operative during the day of February 14, the day of the major fire, and that it had developed a small leak on the fifth floor of one of the buildings in the morning of that day (A-10-11, 22).

3. The lack of any alarm signal indicated that the temperature of the water in the roof tanks serving the sprinkler system was not below freezing (A-8,21).

4. The fire was discovered only after a sprinkler-activated water flow alarm in the basement of one of the buildings sounded at the alarm company's central headquarters, produced by a flow of water in the sprinkler lines (A-8, 11).

5. A single furnace (in No. 653) heated all three buildings. Because of the need for plumbing repairs, no heat was supplied to one of the buildings (No. 657) for 56 hours prior to the fire, while heat continued to be supplied to the other two buildings. Fire Department personnel concluded that the standpipe for the sprinkler system in the *non-heated building* was not frozen at the time of the fire (A-11, 12).

6. There were several factual theories as to why the sprinkler system failed to control the fire in the two heated buildings:

—deliberate shut-off of the system by an arsonist

—a frozen roof tank

—partial freezing of the sprinkler lines

—a basement blockage.

The District Court found that the "most persuasive" theory was that the system was partially frozen and therefore blocked by ice. (A-13).

7. The cause of this partial freezing of the sprinkler system was never established to the District Court's satisfaction. The Court concluded: "Perhaps that re-

sult was produced by a boiler malfunction, an arsonist's act, a plumber's mistake, together with the extreme temperature." (A-21).

The Insurance Company's Defense

The insurance company argued that the partial freezing of the sprinkler system had been caused by a lowering of thermostat settings in the heating system, allegedly ordered by the new owners. The District Court found that the owners had in fact directed the building superintendent to reduce the nighttime settings for the heat timer, so that it would not turn the furnace on until the outside temperature reached was below 25° (the superintendent testified he actually set the switch at 30°). But the Court also found that a 25° setting was not shown to be contrary to acceptable industry standards for commercial buildings of this type, or that a reasonable person would anticipate that such a setting would cause the water in the sprinkler system to freeze. (A-9).

More significant were the Court's findings that the standpipe system *in the building in which the heating system had been turned off* was actually functioning at the time of the fire, and that *the roof water tank on that building was also operative*, indicating that something more than the furnace operation alone was involved. (A-21).

Most importantly, weather bureau records showed that the outside temperature in New York City never rose above 30° for ten days prior to the fire (or above 25° for the entire six day period preceding the fire). At a setting of 30°, as found by the trial court, the furnace was *in full operation* (except for brief electrical maintenance shutdowns which were immediately repaired) *throughout the entire period.* (A-10, 17)

In summary, at the time of the fire, the trial judge found:

A. The sprinkler system was functioning in 657 Broadway.

B. The sprinkler system in 649 and 653 Broadway had been functional earlier on the day of the fire.

C. There was sufficient function in the system at the time of the fire to cause water discharge and activate the water flow alarm to summon the Fire Department.

D. The cause of the non-functioning of the sprinkler system when the Fire Department arrived was most probably partial freezing of the pipes.

E. Any partial freezing of the pipes was contributed to by an extended period of extremely cold weather.

F. Any partial freezing was not the result of any deficiency in sprinkler maintenance.

G. Any partial freezing was not the result of the change in the heat timer setting.

H. Any partial freezing of the sprinkler system would have occurred whether the heat timer was set at 40°, 30° or 25°.

I. Therefore the new owners' change in heating policy was *not* the cause of any partial freezing and malfunction of the sprinklers.

The District Judge explicitly found that the owners had not violated the preventive maintenance or increasd hazard provisions of the policy. (A-16)

The False Swearing Defense

During the insurance company's investigation of the fire loss, its counsel interrogated two representatives of the owner on many different aspects of the incident. The lengthy questioning included questions about the daytime and nighttime outside temperature settings which activated the operation of the furnace. Both said that the daytime setting was at 55° and the nighttime setting was at 40°. They also testified that the building superintendent continued to have responsibility for sprinkler maintenance.

The District Court found these statements to be "inaccurate and consequently false" (also describing them as "mistaken") and

credited instead the trial testimony given by the building superintendent that he had been instructed by the new owners to set the heat timer at nighttime at an outside temperature of 25° (but had actually set it at 30°), and also had not been given any instructions with respect to sprinkler maintenance (although the trial judge noted that the superintendent's testimony was "confused") (A-14, 16).

However, the District Court expressly found that this inaccurate or false testimony was not material since it made no difference as far as the loss was concerned:

> Here the statements were not material to the investigation. Given the extreme temperatures during the period from February 5th to February 14 as noted above, whether the heat timer setting was 25 degrees, 30 degrees or 40 degrees would not have affected the operation of the heating system. Further there was no testimony that a 25 degree or 30 degree setting would have constituted a practice which would have reasonably been foreseen to result in a freezing condition, which, in turn would have made the sprinkler system inoperative.
>
> Similarly with respect to the sprinkler maintenance issue, whether Aloisio was instructed to perform maintenance on the sprinkler system or not, in fact he did take the action necessary to repair the system, and there is no indication in this record that any failure of record keeping or regular maintenance was in any way responsible for the freeze-up. Since the Fine policy of freeze-out has not been proved to be the cause of the freeze-up, the false statements, viewing them as such, were not material as contemplated under section 168. (A-17)

The Court of Appeals, formulating its own federal common law rule contradicting the New York Court's, reversed on this issue, holding that the test of materiality was not whether the *ultimate* fact was material, but rather whether it seemed rele-

vant or productive to the insurance company *at the time of the interrogation.*

> It thus appears that materiality of false statements is not determined by whether or not false answers deal with a subject later determined to be unimportant because the fire and loss were caused by factors other than those with which the statements dealt. False sworn answers are material if they might have affected the attitude and action of the insurer. They are equally material if they may be said to have been calculated either to discourage, mislead or deflect the company's investigation in any area that might seem to the company, at that time, a relevant or productive area to investigate. (725 F.2d at 184; B-12).

Importance of this Appeal

This appeal presents issues of substantial importance to all residential home and commercial building owners not only in New York but also elsewhere throughout the United States. While the Court of Appeals' decision is limited to fire insurance policies, property damage insurance policies as well as many other types of insurance policies usually also contain a similar false swearing provision. *See* 44 Am. Jur. 2d, *Insurance* § 1371 (1982); 31 N.Y.Jur., *Insurance* § 1298 (1963). Accordingly, the Second Circuit's decision, if it is followed by other courts, will have a substantial impact throughout the insurance field. The ramifications of this case affect insurance policy coverage in the range of *billions* of dollars.

From the standpoint of this Court, the case involves the larger question of the proper division of responsibility and functions between Federal and State courts. In an era when many judicial administrators are urging termination of *diversity jurisidction* in the Federal courts, the Second Circuit's decision offers a bonanza for out-of-state insurance companies who are able to benefit from looser standards for voiding coverage simply by removing their cases out of the State courts' reach.

The Court of Appeals' original decision results in one principle of law for insurance contracts issued by New York based insurance carriers and a totally different principle of law for insurance contracts issued by out-of-state insurance carriers.

The decision of the original panel in this case is now the controlling law in the Federal Courts in this Circuit. It is a bonanza for out-of-state insurance companies who can *always* remove cases to Federal District Courts which are originally brought by property owners in the New York State Courts.

The current law in the New York State courts requires two elements to void insurance policies:

(1) Wilful intent to defraud, and

(2) Materiality.

On July 2, 1984, the New York Court of Appeals issued its Opinion in *Deitsch Textiles, Inc. v. New York Property Ins. Underwriting Ass'n*, (A-130) now reported at 62 N.Y.2d 999, 479 N.Y.S.2d 487 (1984). The decision of this Court in Docket No. 83-7188/98 is *directly contrary* to the New York Court of Appeals' decision in *Deitsch Textiles, Inc.*

The current law in the Federal courts in New York State (established in *this case*) involves only *one* element – materiality – which can be established on a much easier standard than under New York law. No proof of wilfulness is required at all.

Choice of forums has now become a game with big price tag. The lucky insurance company that can get into the Federal courts on diversity grounds can void literally millions of dollars in claims that would have to be paid if the claims were litigated in the state courts.

APPENDIX F

Suggestions of Additional Procedures to Reduce or Prevent Errors in the Court of Appeals (See Point I of Petition, pages 9-12)

There are other procedures that could be devised to promote error-correction at the circuit court level. This case, where the second panel *conceded* that the first panel's decision was not a correct application of the governing law, highlights the need to develop such procedures. We urge the Court to invoke its broad supervisory powers to mandate such procedures — as it has done in similar circumstances in the past. See, e.g., *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247 (1953) (ordering each circuit to establish a clear procedure for determining when *en banc* hearings may be had). The procedures that might be installed are legion. We offer two only as illustrations.

First, this Court could order that, at least in cases where there is an objective warning signal that the circuit panel is in error, petitions for rehearing be directed *not* to the panel that decided the case, but to another panel of the court. A fundamental problem with the petition for rehearing as presently constituted is that the petition is directed to the panel that decided the case. As one commentator put it:

> "This approach is not fair. While [the original panel] is entitled to see and respond to the motion, [that panel] is often the one least likely to agree that [its] opinion was faulty.

R. Leflar, *Internal Operating Procedures of Appellate Courts* 61 (1976). As a response to this reality the Court could promulgate a rule that, in the approximately 15 per cent of the cases where a Circuit panel reverses a District Court, a petition for rehearing be directed to the then sitting motions panel of the Circuit Court. If this second panel granted the petition for rehearing, the case could be assigned for rehearing either by the judges on the motions panel or by an entirely new panel. True, this procedure requires some investment of judicial resources, because the motions panel must make a preliminary assessment of the

case and decision rendered. The investment of resources would be significantly less than that required for rehearing *en banc*, however, and would provide the meaningful review that only can come from having a panel with no preconceptions look at the case.*

Second, either independent of the first suggestion or in conjunction with it, this Court could order that, at least in cases where the Circuit Court intends to reverse the District Court, the panel circulate a draft opinion to the parties for comment. See Saeta, *Tentative Opinions: Letting a Little Sunshine Into Appellate Decision Making*, 20 *Judges' Journal No. 3* at p. 20 (Summer 1981) (suggesting such a procedure). In 1979, Judge Harold Leventhal chaired a panel of the United States Court of Appeals for the District of Columbia that developed and employed with great success a similar procedure in a huge environmental case. *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). There the court issued its tentative opinion on June 18, 1979, and its final opinion (incorporating several modifications based upon the submissions of the parties) on December 14. The procedure was widely hailed at the time precisely because the court engaged in a dialogue with the parties during the decisionmaking process, which dialogue was designed to avoid and correct error without higher court intervention.

The two procedures offered here are two of a myriad of possible measures that could be designed to encourage the avoidance and correction of error at the Circuit Court level. Given the undesirability (and impossibility) of making this Court into a court of last resort in each case, and given a parallel need to minimize error at the Circuit Court level, *some* such procedures must be developed. This case both highlights the need for such procedures and provides this Court with a proper vehicle for promulgating them.

A sensitive analysis of various techniques used or proposed for quality control at the appellate level in the state courts is set forth in Thomas B. Marvell's *Appellate Courts and Lawyers — Infor-*

* In those cases where the second panel to hear the case reaches a different result from the first panel, a strong, but not irrebuttable, case for *en banc* consideration might be present. Conversely, if the second panel reaches the same result as the first, *en banc* review presumably never would occur — yet, a contribution would have been made to the development of a circuit-wide consensus on the legal issue involved.

mation Gathering in the Adversary System (Greenwood Press, 1978). In Appendix B to that work, "Suggestions for Appellate Court Decision-Making Procedures," Mr. Marvell has assembled an impressive list of practical ideas to reduce the incidence of judicial mistakes of the sort evidenced in this case. They include:

> Prehearing judges' conferences (instituted by Chief Justice Vanderbilt in New Jersey (p. 244)
> Circulation of a tentative draft opinion to counsel (California) (p. 245)
>
> Use of a "check judge" (four states) (p. 247)
>
> Announcement of the judges' preliminary votes prior to oral argument (Arizona*) (p. 248)
>
> Circulation of draft opinions to all staff attorneys** (p. 254)

In his conclusion, Mr. Marvell states that these techniques are applicable to *any* appellate court (except *this* Court) and can be adopted separately or in unison.

> Past efforts to make appellate judges more productive have focused on staff help and on dropping parts of the appellate process, especially oral arguments and opinions. The suggestions here focus on greater productivity and quality of decisions through more efficient use of judges' time and through greater use of counsel's efforts. That is, the judges should make their working hours count as much as possible, and they should wring every bit of help they can out of the attorneys. . ." (II. p. 255).

Mr. Marvell's main point is that the adversary process could be better harnessed to help appellate courts minimize their own errors. His final two sentences bear reading and re-reading in the context of the present case, where counsel's efforts – through petitions for rehearing, *certiorari* and motion for a new trial – *still* have not been able to correct an appellate error which everyone seems prepared to concede took place.

> Judges often complain about the quality of advocacy. But they should not put all the blame on the other side of the bench; they can do much to help counsel prepare better and provide more helpful information. (*Ibid.*)

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* A practice adopted in Arizona after publication of Mr. Marvell's book. Information supplied to counsel by the author in a telephone conference.

** See D. Meador, *Appellate Case Management and Decisional Process*, 61 Va. L. Rev. 255, 288 (1975).